TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 234.

W. N. WALTON, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE MARIETTA CHAIR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JULY 18, 1894.

(14,750.)

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1 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

At a stated term of the circuit court of the United States of America within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-room, at the city of Columbus, O., on the first Tuesday of December, being also the second day of that month, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States of America the one hundred and fifteenth—present, the Honorable George R. Sage, district judge—among the proceedings had were the following, to wit:

W. N. WALTON, Adm'r, &c., Plaintiff, }
vs. } At Law.
MARIETTA CHAIR COMPANY, Defendant. }

Be it remembered that heretofore, to wit, on the 30th day of November, in the year of our Lord one thousand eight hundred and eighty-seven, came the plaintiff, W. N. Walton, by his attorneys, and filed in the clerk's office of the court aforesaid his certain petition against the defendant herein. Said petition is clothed in the words and figures following, to wit:

Petition.

2 UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, }

In the Circuit Court of the United States for said District, Eastern Division.

W. N. WALTON, Administrator of the Estate of Latimer Bailey, Dec'd, a Citizen of the State of New Jersey, Plaintiff,
vs.
THE MARIETTA CHAIR COMPANY, a Corporation Created and Existing under the Laws of the State of Ohio, Having Its Principal Office and Place of Business in the County of *Worthington* and State of Ohio, Defendant.

The said plaintiff complains and says that on the 1st day of January, 1875, and from thence until the 4th day of May, 1885, the said decedent, Latimer Bailey, was seized in fee-simple of and was in possession of a certain tract or parcel of land, containing about eight hundred acres, lying and being on the waters of Middle Island creek, in the county of Pleasants and State of West Virginia, bounded and described as follows:

Beginning at an elm at the mouth of a small run and about 125 rods above the mouth of Stout's run, and running thence N. 2 E.

$364\frac{9}{10}$ poles to a stake near Tackett's run; thence S. $43\frac{1}{4}$ W. 407 poles to a stake on the side of the county road leading down Stout's run; thence N. $87\frac{1}{2}$ W. $36\frac{8}{10}$ poles to a chestnut tree; thence N. 3 E. $151\frac{3}{10}$ poles to a poplar stump; thence N. $1\frac{1}{4}$ E. $106\frac{1}{2}$ poles to a stake on the bank of Middle Island creek; thence up said creek
3 with the meanders thereof $186\frac{3}{10}$ poles to a stake on the bank of the creek; thence across the neck of land made by the bend of the creek S. $47\frac{1}{4}$ # 54 poles to a stake on the bank of the creek; thence up said creek with the meanders thereof $309\frac{1}{10}$ poles to the place of beginning.

And plaintiff further says that on the first day of January, 1873, and on divers other days between that and the 4th day of May, 1885, the said defendant unlawfully and with force broke and entered in and upon the aforesaid tract of land, being the land of the said Latimer Bailey, deceased, aforesaid, and did, by cutting timber, hawling with teams across the same, and removing and hauling timber, railroad cross-ties, tan bark, staves, locust posts, sawed lumber, and other timber, greatly cut up, obstruct, encumber with brush, and devastate said land, and did cut down, remove, and carry away from said land a large quantity of various kinds of timber, to wit, about 3,000 oak trees, about 100 ash trees, about 1,000 poplar trees, about 200 walnut trees, about 500 hickory trees, about 500 beach trees, about 500 sugar-maple trees, about 50 cherry trees, and about 500 locust trees, of the value of ten thousand dollars, and converted and disposed of the same to its own use, and otherwise injured said premises—

To the damage of the said Latimer Bailey, now deceased, five thousand dollars, for which the plaintiff asks judgment.

And the plaintiff further complains and says that on the 1st day of January, 1875, and on divers other days between then and the 4th day of May, 1885, the said defendant unlawfully took into its possession and received about 45,000 oak saw-logs, about 200 ash saw-logs, about 2,500 poplar saw-logs, about 400 walnut saw-
4 logs, about 1,000 hickory logs, about 1,000 beech logs, about 1,000 sugar-maple logs, about 100 cherry logs, about 1,000 locust logs, of the value of $10,000, being then and there the property of the said Latimer Bailey and then lately cut and removed from said tract of land, and did convert and dispose of the same to its own use, to the damage of the said Latimer Bailey, now deceased, ten thousand dollars, for which the plaintiff asks judgment.

And the plaintiff says that the said Latimer Bailey departed this life on the 4th day of May, 1887, and that the plaintiff has been duly appointed and qualified as administrator of his estate by proceedings of the probate court of the county of Washington, in the State of Ohio.

Wherefore the plaintiff prays judgment against the said defendant for the said sum of ten thousand dollars for the value of the timber aforesaid, with interest, and for other relief.

HUTCHINSON & JOHNSON AND
—— ——, *Att'ys for the Plaintiff.*

STATE OF WEST VIRGINIA, } ss:
Wood County, }

Thursday, W. N. Walton, the plaintiff, named as administrator, &c., in the foregoing petition, personally appeared before me, J. W. Vandervoort, a notary public in and for said county, and, being duly sworn, says that the several matters and things set forth in the said foregoing petition are true as he verily believes.

W. N. WALTON.

Taken, sworn to, and subscribed before me this November 24, 1887, as witness my hand and notarial seal.

[SEAL.] J. W. VANDERWORT,
Notary Public for Wood Co., W. Va.

5 And afterwards, to wit, on the 6th day of November, A. D. 1887, the following præcipe was filed in the clerk's office of said court; which said præcipe is clothed in the words and figures following, to wit:

Præcipe.

W. N. WALTON, Adm'r of the Estate of Latimee Bailey, Deceased, a Citizen of the State of New Jersey, Plaintiff,
vs.
THE MARIETTA CHAIR COMPANY, a Corporation Created and Existing under the Laws of the State of Ohio, Having its Principal Office and Place of Business in the County of *Worthington* and State of Ohio, Defendant.

Issue process to answer the petition of plaintiff and endorse that plaintiff demands judgment for $10,000.

HUTCHINSON & JOHNSON,
Att'ys for Plaintiff.

To the clerk of the circuit court of the United States for the southern district of Ohio, Columbus, O.

And afterwards, to wit, on the same day as aforesaid, there was issued out of the clerk's office of said court the following summons, directed to the marshal and against the defendant herein; said summons is clothed in the words and figures following, to wit:

Summons.

6 THE UNITED STATES OF AMERICA, } ss:
Southern District of Ohio, Eastern Division, }

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

You are hereby commanded to summon the Marietta Chair Company, a corporation existing under the laws of the State of Ohio,

having its principal office and place of business in the county of Washington and State of Ohio, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Columbus, on the 4th Tuesday in the month of December, 1887, to answer unto W. N. Walton, administrator of the estate of L. Bailey, deceased, citizen of and resident in the State of New Jersey, in civil action for recovery of money; and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, this 30th day of November, A. D. 1887, and in the 112th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk*,
[SEAL.] By NELLIE PRENTISS, *Deputy*.

(Endorsed:) Action for the recovery of money. Amount claimed of defendant, $10,000, for which judgment may be taken unless they answer on or before the 4th Tuesday in the month of December, 1887.

7 And afterwards, to wit, on the 13th day of December, A. D. 1887, came the marshal of the district to whom the aforesaid summons was in form directed and filed the same in the clerk's office of said court, with his proceedings endorsed thereon in the words and figures following, to wit:

Marshal's Return.

Received this writ on the 30th day of November, A. D. 1887, and on the 10th day of December, A. D. 1887, I served the same by handing a true copy thereof, with the endorsement thereon, to said John Mills, Jr., president and treasurer of the within-named Marietta Chair Co., at same time — John Garney, sec. of the within-named Marietta Chair Co., at Marietta, Ohio.

H. C. URNER,
U. S. M., S. D. O.,
By J. R. SEDLIN, *Deputy*.

Fees.

Actual ex.:	
2 copy	1 00
R. R. fare	7 45
2 services	4 00
Hotal	1 50
1 day, deputy	2 00
	15 95

And afterwards, to wit, on the 13th day of December, A. D. 1887, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

U. S. OF AMERICA, }
Southern District of Ohio. }

8 In the Circuit Court of the United States for said District Eastern Division.

W. N. WALTON, Adm'r., &c., }
vs.
THE MARIETTA CHAIR CO., a Corporation, &c. }

And now the said Marietta Chair Company, appearing solely for the purposes of this motion and not intending thereby to enter its appearance herein, moves the court that the marshal's return of service of summons herein be set aside and that the pretended service of summons herein upon said company be set aside for the reason that the said return is not true and no valid or sufficient or legal service of summons herein has ever been made upon said company.

A. D. FOLLETT,
Attorney for Marietta Chair Company.

And afterwards, to wit, on the 13th day of February, A. D. 1888, there was issued out of the clerk's office of said court our certain alias summons directed to t-e marshal of the district; said alias summons is clothed in the words and figures following, to wit:

Alias Summons.

UNITED STATES OF AMERICA, }
Southern District of Ohio, Eastern Division, } *ss:*

The President of the United States of America to the marshal of the southern district of Ohio, Greeting:

9 You are hereby commanded to summon the Marietta Chair Company, a corporation existing under the laws of the State of Ohio, having its principal office and place of business in the county of Washington and State of Ohio, citizen of and resident in the State of Ohio, if it be found in your district, to be and appear in the circuit court of the United States for the southern district of Ohio aforesaid, at Columbus, on the 2nd Tuesday in the month of March, 1888, to answer unto W. N. Walton, administrator of the estate of Latimer Bailey, deceased, citizen of and resident in the State of New Jersey, in civil action for the recovery of money.

And have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States, t-is 13th day of Feb., A. D. 1888, and in the 112th year of the Independence of the United States of America.

Attest: B. R. COWEN, *Clerk,*
[SEAL.] By NELLIE PRENTISS, *Deputy.*

(Endorsed:) Action for the recovery of money. Amount claimed of defendants, $10,000, for which judgment may be taken unless they answer on or before the 2nd Tuesday in the month of March, 1888.

And afterwards, to wit, on the 21st day of Feb., A. D. 1888,
10 came the marshal to whom the aforesaid alias summons was in form directed and filed the same in the clerk's office of said court, with his proceedings had endorsed thereon in the words and figures following, to wit:

Marshal's Return of Alias Summons.

Received this writ on the 13th day of February, A. D. 1888, and on the 20th day of February, A. D. 1888, I served the same by handing a true copy thereof, with the endorsement thereon, to said John Mills, Jr., president of the within-named company; same day to John Gorney, sect., both residing in Marietta, Ohio.

Fees, total, $17.18.

H. C. URNER,
U. S. M., S. D. O.,
By ROBERT BELL, *Deputy.*

And afterwards, to wit, on the 10th day of March, A. D. 1888, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Motion.

In the Circuit Court of the United States, Sixth Circuit, Southern District of Ohio, Eastern Division.

W. N. WALTON, Adm'r, &c.,
vs.
THE MARIETTA CHAIR COMPANY, a Corporation.

And now comes said Marietta Chair Company and moves the court herein as follows:

First. To require said plaintiff to separately state and number the causes of action set up in the petition herein.

Second. Should the foregoing motion be overruled, then said Marietta Chair Company moves the court herein to require
11 said plain- to elect upon which of the clauses of action set up in the petition herein he will proceed to trial.

Third. Should both the foregoing motions be overruled, then the said Marietta Chair Co. moves the court herein to require said plaintiff to make his petition herein more definite and certain as follows:

1. By more definitely and certainly stating therein the days between January 1st, 1875, and May 4th, 1885, on which it is claimed by plaintiff said chair company unlawfully and with force broke and entered in and upon the tract of land described in the petition and did to and upon said land the acts claimed in the petition to

have been done and cut and removed and carried away the trees in the petition mentioned and took into its possession and received the logs mentioned in the petition.

2. By more definitely and certainly stating the acts of defendant complained of by plaintiff and the injuries claimed to have been suffered in consequence of such acts.

3. By more definitely and certainly stating the several trespasses and conversions claimed to have been committed by defendant and the property injured by each trespass and conversion and the value thereof.

By A. D. FOLLETT,
Att'y for Marietta Chair Company, Defendant.

And afterwards, to wit, on the 12th day of June, A. D. 1888, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 153.

This day this cause came on to be heard upon the motion of defendant to require the plaintiff to make his complaint more definite and certain, as set out in said motion, and also to require the plaintiff to number his causes of action.

And it is considered by the court that unless the plaintiff amend his petition so as to show that the trespass complained of
12 was a continuous trespass between the times mentioned in the petition the motion in that regard will be sustained.

And it is further considered by the court that the motion as to numbering the causes of action be, and is hereby, sustained.

And leave is granted the plaintiff to file an amended petition within 30 days and to the defendant to answer within 30 days thereafter.

And afterwards, to wit, on the 22nd day of June, A. D. 1888, the following amended petition was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss*:
Southern District of Ohio, }

In the Circuit Court of the United States for said District, Eastern Division.

W. N. WALTON, Adm'r, &c., }
vs. }
THE MARIETTA CHAIR CO., a Corporation, &c. }

Amended Petition.

The said plaintiff complains and says that he is a citizen of the State of New Jersey; that the defendant is a corporation of the State of Ohio and a citizen of said State of Ohio; that on the 1st day of

January, 1875, and from thence until the 4th day of May, 1885, the said decedent, Latimer Bailey, was seized in fee-simple of and was in the possession of a certain tract or parcel of land containing about eight hundred acres, lying and being on the waters of Middle Island creek, in the county of Pleasants, in the State of West Virginia, bounded and described as follows:

13 Beginning at an elm at the mouth of a small run and about 125 rods above the mouth of Stout's run, and running thence N. 2 E. $364\frac{8}{10}$ poles to a stake near Tachet's run; thence S. 43¼ W. 207 poles to a stake on the side of the county road leading down Stout's run; thence N. 87½ W. $36\frac{8}{10}$ poles to a chestnut tree; thence N. 3 E. $151\frac{3}{10}$ poles to a poplar stump; thence N. 1¼ E. 106½ poles to a stake on the bank of Middle Island creek; thence up said creek with the meanders thereof $186\frac{3}{10}$ poles to a stake on the bank of the creek; thence across the neck of land made by the bend of the creek S. 47¼ E. 54 poles to a stake on the bank of the creek; thence up said creek with the meanders thereof $309\frac{1}{10}$ poles to the place of beginning.

And the plaintiff says that said tract of land so owned and possessed by the said Latimer Bailey in his lifetime at the time aforesaid was thickly wooded with divers and sundry kinds of excellent timber standing and growing thereon, and that while said land and timber was so owned and possessed by said Latimer Bailey at the time aforesaid divers and sundry persons, knowing the land and timber to be the rightful property of the said Latimer Bailey and without any right or authority from the said Bailey whatsoever, at the instance of and for the use and benefit of the said defendant, on the said first day of January, 1875, and on divers other days from time to time, continuously between that date and the said 4th day of May, 1885, did cut down and remove and cut into saw-logs divers and sundry of said timber trees, and the said defendant, well knowing the said saw-logs, to wit, about 4,500 oak saw-logs, about 200 ash saw-logs, about 2,500 poplar saw-logs, about 1,000

14 hickory saw-logs, about 1,000 beach logs, about 1,000 sugar-maple logs, about 100 cherry logs, and about 1,000 locust logs, to be the property of the said Latimer Bailey, and well knowing the same to be cut from the said land, knowing the said land to be the property of the said Latimer Bailey, did without any right or authority whatsoever from the said Bailey take into its possession the aforesaid saw-logs, timber, and logs, so cut and removed from said land, being the property of the said Latimer Bailey and being of the value of $10,000, and did convert the same to its own use, and by reason of the taking, using, and conversion of the said saw-logs, timber, and logs by the said defendant the said Latimer Bailey suffered damage to the full value of the same, to wit, the sum of $10,000.

And the plaintiff says that the said Latimer Bailey departed this life on the 4th day of May, 1885, and that the said plaintiff has been duly appointed and qualified as administrator of the estate of said Latimer Bailey by proper proceedings had in the probate court of Washington county, Ohio.

Wherefore the plaintiff asks judgment against the said defendant for the said sum of $10,000.

W. N. WALTON,
Adm'r of the Estate of Latimer Bailey, Dec'd.

HUTCHINSON & JOHNSON AND
E. L. DE WITT,
Att'ys for Plaintiff.

STATE OF OHIO, }
Franklin County, } ss:

This day personally appeared before me, Edward J. Dowdall, a notary public in and for said county, W. N. Walton, the plaintiff, who as administrator of the estate of Latimer Bailey, deceased, is named in the foregoing amended petition, who, being duly
15 sworn, made oath and says that the facts and allegations in said petition contained so far as stated upon his own information are true, and so far as stated on information derived from others he believes them to be true.

W. N. WALTON.

Taken, sworn to, and subscribed before me this 21st day of June, 1888.

Witness my hand and notarial seal.

EDWARD J. DOWDALL,
Notary Public, Franklin Co., Ohio. [SEAL.]

And afterwards, to wit, on the 8th day of August, A. D. 1889, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States of America, Sixth Circuit, Southern District of Ohio, Eastern Division.

W. N. WALTON, Adm'r of the Estate of Latimer Bailey, Deceased, Plaintiff,
vs.
THE MARIETTA CHAIR CO., Defendant. } Answer.

And now comes said defendant and for answer to the amended petition herein says:

First defense. That it admits that it is a corporation of the State of Ohio and a citizen of said State.

As to the averments contained in the petition herein that on January 1st, 1875, and from thence until May 4, 1885, said
16 *said* Latimer Bailey was seized in fee-simple of and was in possession of the tract of land in the petition described, defendant has no knowledge or information concerning said matters sufficient to enable it to form a belief respecting them, and defendant denies each and all of said averments.

As to the averments in the petition herein that said Latimer Bailey departed this life on May 4, 1885, defendant has no knowl-

edge or information sufficient to enable *him* to form a belief respecting the same and defendant denies said averment.

Defendant denies each and every allegation of said amended petition herein which is not expressly admitted in this answer.

Second defense. Defendant for a second defense herein says that the cause of action of the plaintiff herein did not accrue within four years next before the commencement of this action, and that the plaintiff's action is barred by the statutes of the State of Ohio limiting the time within which such an action must be commenced.

Third defense. Defendant for a third defense herein says that by the laws and statutes of the State of West Virginia in force and effect on January 1st, 1875, and prior thereto and ever since every personal action for which no limitation is otherwise prescribed shall be brought within five years next after the right to bring the same shall have accrued if it be for a matter of such nature that in case a party died it can be brought by or against his representative, and if it be for a matter not of such nature shall be brought within one year next after the right to bring the same shall have accrued and not after; that by said laws and statutes of said State of West

17 Virginia in force and effect on January 1, 1875, and prior thereto and ever since the only personal actions for which any limitation is prescribed otherwise than as above are in every action to recover money which is founded upon an award or on any contract other than a judgment or recognizance, every action or *scire facias* upon a recognizance, every action or suit upon a judgment or decree rendered in any other State or country, actions or suits to avoid a gift, conveyance, assignment, transfer, or charge which is not on consideration deemed valuable in law for that cause only, a bill in equity to repeal in whole or in part any grant of land by said State of West Virginia or the State of Virginia.

Defendant says that the cause of action of the plaintiff herein did not accrue within five days next before the commencement of this action, and that the plaintiff's action is barred by the statutes of the State of West Virginia limiting the time within which such an action must be commenced.

Wherefore defendant prays that it may go hence without day and recover its costs herein, and for any and all relief that it is entitled to.

By HARRISON, OLDS & MARSH AND
A. D. FOLLETT, *Its Attorneys.*

STATE OF OHIO, }
Washington County, } *ss:*

John Mills, being first duly sworn, says that he is the president of defendan*y*t, and that the above answer and all and singular the allegations and denials thereof are true, as he believes.

JNO. MILLS.

Subscribed in my presence and sworn to before me this 3rd day of Aug., A. D. 1888.

THOMAS EWART,
N. P., Wash. Co., O. [SEAL.]

18 And afterwards, to wit, on the 25th day of October, A. D. 1888, the following reply was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Reply.

In the Circuit Court of the United States of America, Sixth Circuit, Southern Dist. of Ohio, Eastern Division.

W. N. WALTON, Administrator of the Estate of Latimer Bailey, Deceased, Plaintiff,
vs.
THE MARIETTA CHAIR COMPANY, Defendant. } Replication.

And now comes the said plaintiff and, for replication to the second and third defenses set up on the defendant's answer heretofore filed in this cause, for reply thereto the plaintiff says that the said defendant, The Marietta Chair Company, was not discovered as the wrongdoer of the matters complained of in the plaintiff's amended petition until the month of September, 1885, to wit, less than four years before the commencement of this suit; that prior to that time neither the said Latimer Bailey in his lifetime nor the said plaintiff nor any other interested party to said action had discovered that the said defendant had been guilty of the wrongs and injuries complained of in the plaintiff's amended petition, or that it had cut, removed, and carried away or caused to be cut, removed, and carried away the timber of various kinds mentioned and set out in the said amended petition.

And so the plaintiff says the cause of action in said peti-
19 tion mentioned cannot in law be deemed to have accrued until within the period of four years before the institution of this suit.

By HUTCHINSON & JOHNSON AND
E. L. DE WITT, *Plaintiff's Attorneys.*

STATE OF OHIO, }
Washington County, } *ss:*

W. N. Walton, being first duly sworn, says that he is the party named as administrator and plaintiff in the above replication to the defendant's answer, and that the statements and allegations set forth in said reply are true as he verily believes.

W. N. WALTON.

Taken, sworn to, and subscribed before the undersigned, a notary public in and for Washington county, State of Ohio, as witness my hand and notarial seal this 4th day of October, 1888.

J. M. MITCHELL,
Notary Public, W. C., O. [SEAL.]

And afterwards, to wit, on the 12th day of December, A. D. 1889, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 211.

This day came L. W. Ellenwood and suggests here to the court that the said W. N. Walton has since the last continuance of this action at the June, 1889, term of this court, been removed from the office of administrator of the estate of Latimer Bailey, deceased, and his letters of administration revoked, and the said L. W. Ellenwood has been duly appointed and qualified as administrator of the
20 estate of the said Latimer Bailey, deceased, and the court, being satisfied of the truth of such suggestion, do, on motion of the said L. W. Ellenwood, order that the said action do stand revived in the name of the said L. W. Ellenwood as such administrator and proceed in his favor unless sufficient cause be shown against said revivor within the time allowed by law, to wit, on or before the 11th day of January, A. D. 1890, after the service of this order upon the said defendant.

And afterwards, to wit, on the 12th day of December, A. D. 1889, there was issued out of the clerk's office of said court a certified copy of entry directed to the marshal of the district; said entry is clothed in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Eastern Division, } *ss:*

At a stated term of the circuit court of the United States of America within and for the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and had in the court-rooms, at the city of Columbus, O., in said district, on the first Tuesday of December, being the third day of that month, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and fourteenth.

Present: The Hon. George R. Sage, district judge.

On Thursday, the twelfth day of December, 1889, among the proceedings had were the following, to wit:

W. B. WALTON, Adm'r of the Estate of Latimer Bailey, Dec'd, }
Pl't'ff, }
21 *vs.* }
THE MARIETTA CHAIR COMPANY, Defendant. }

This day came L. W. Ellenwood and suggests here to the court that the said W. N. Walton has, since the last continuance of this action at the June, 1889, term of this court, been removed from the office of administrator of the estate of Latimer Bailey, deceased, and his letters of administration revoked and the said L. W. Ellenwood has been duly appointed and qualified as administrator of the estate of the said Latimer Bailey, deceased; and, the court being satisfied of the truth of such suggestion, do, on motion of the said L. W. Ellenwood, order that the said action do stand revived in the name of the said L. W. Ellenwood as such administrator, and proceed in

his favor, unless sufficient cause be shown against said revivor within the time allowed by law, to wit, on or before the 11th day of January, A. D. 1890, after the service of this order upon the said defendant.

THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Eastern Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing entry is truly taken and correctly copied from the journal of said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, O., this 12th day of December, A. D. 1889.

[SEAL.]

B. R. COWEN, *Clerk,*
By C. P. WHITE, *Deputy.*

22 And afterwards, to wit, on the 23rd day of December, A. D. 1889, came the marshal, to whom the above entry was in form directed, and returned the same into the clerk's office of said court, with his proceedings had thereon endorsed in the words and figures following, to wit:

Marshal's Return.

Received this writ December 12, 1889, at 2 o'clock p. m., and on the 19th day of December, A. D. 1889, I executed the same by delivering personally to John Mills, president, and John J. Garry, sec'y, of the said Marietta Chair Company, each a certified copy of this writ.

J. H. SIMMONS,
U. S. Marshal, S. D. O.,
By WALTER E. HYSELL, *Deputy.*

Fees, total, $14.70.

And afterwards, to wit, on the 22nd day of January, A. D. 1890, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, p. 216.

Now come the said L. W. Ellenwood mentioned in the conditional order of revivor herein, and, it appearing to the court that the conditional order of revivor herein has been duly served upon the said defendant and no cause having been shown against said revivor, it is hereby ordered that this action do stand revived in the name of L. W. Ellenwood, as administrator of the estate of Latimer Bailey, deceased, and proceed in the name of L. W. Ellenwood, administrator as aforesaid.

23 And afterwards, to wit, on the 9th day of February, A. D. 1891, the following answer was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

Answer.

In the Circuit Court of the United States of America, S. D. O., Eastern Division.

W. N. WALTON, Adm'r, &c., Plaintiff,
vs.
THE MARIETTA CHAIR COMPANY, Defendant.

And now comes the said Marietta Chair Company, defendant herein, and objects and protests to the revivor of this action in the name of L. W. Ellenwood, as administrator of the estate of Latimer Bailey, deceased, and objects to said action proceeding in his favor, and for full and sufficient cause against said revivor shows the court herein and avers as follows:

First. This defendant is and always has been a citizen and resident of the State of Ohio, and said L. W. Ellenwood is and always has been a citizen and resident of the State of Ohio.

Said Latimer Bailey died May 4th, 1885. On December 12, 1889, more than four years, and more than six years had elapsed since the cause of action set up in the petition herein or any part thereof accrued, and said cause of action and every part thereof was prior to December 12, 1889, and ever since barred by the statutes of limitation of the State of Ohio.

Second. Said L. W. Ellenwood is not the successor in office of said W. N. Walton, as administrator of the estate of said Latimer Bailey, deceased. Said W. N. Walton never was the

24 administrator of said Latimer Bailey, deceased, or of his estate, and any appointment of said W. N. Walton, as administrator of said Latimer Bailey or his estate by said probate court of Washington county, Ohio, was without jurisdiction or authority on the part of said court to make such appointment, and was irregular, illegal, invalid, and wholly null and void. Said Latimer Bailey died May 4th, 1885, in the State of New York, and was at the time of his death and for many years theretofore a citizen and resident of the State of New York, and did not leave any estate to be administered within the State of Ohio or in said county. Said W. N. Walton was not the husband or widow or next of kin of said Latimer Bailey, and was not a creditor of said Latimer Bailey.

On December 12, 1889, more than four years, and more than six years had elapsed since the cause of action set up in the petition herein or any part thereof accrued, and said cause of action and every part thereof was prior to December 12, 1889, and ever since barred by the statutes of limitation of the State of Ohio; all of which said Marietta Chair Company, defendant, is ready to make appear.

Wherefore said Marietta Chair Company, defendant, prays that said action be not revived in the name of said L. W. Ellenwood, as administrator of the estate of said Latimer Bailey, deceased, and that said action should not proceed in his favor, and that it may have any and all relief that it is entitled to.

HARRISON, OLDS & HENDERSON AND
A. D. FOLLETT,
Att'ys for Marietta Chair Co.

STATE OF OHIO, }
Washington County, } *ss:*

John Mills, being first duly sworn, says on an oath that
25 he is president of said Marietta Chair Co., defendant; that the foregoing pleading or showing and all and singular the allegations and averments thereof are true, as he believes.

JNO. MILLS.

Subscribed in my presence and sworn to before me on this — day of May, A. D. 1890.

JOHN H. SNODGRASS,
Notary Public. [SEAL.]

26 And afterwards, to wit, on the 9th day of February, A. D. 1891, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 272.

And now this cause came on to be heard by the court upon the application herein to the court of the defendant, by its attorneys, made in open court prior to the 11th day of June, A. D. 1890, to vacate and set aside the order of court herein made on the 22nd day of January, A. D. 1890, and of record in the Journal "B," page 216, purporting to make absolute the conditional order of revivor herein made of the 2nd day of December, A. D. 1889, and of record in Journal "B," p. 211, for reasons shown to the court and upon the evidence, and -he sam- was argued by counsel and submitted to the court.

On consideration whereof, and being fully advised in the premises, the court finds as follows, to wit:

(1.) The duly certified copy of said conditional order of revivor served on the defendant herein and the order of the court as shown to the defendant by such copy notified and directed the defendant to answer the rule of said conditional order and show cause to the court on or before the 11th day of June, 1890, why the said conditional order should not be made absolute, whereas the said conditional order, as it was entered and now appears on the journal of the court, in Journal "B," page 211, was that the defendant should so answer and show cause to the court on or before the 11th day of January, A. D. 1890.

(2.) The defendant and its attorneys at the time resided
27 far distant from where the court sits and its records were and are kept and had no knowledge whatever until long after the said 22nd day of January, 1890, and shortly before the said 11th day of June, 1890, that the said conditional order, as entered of record, notified and directed the defendant to so answer and show cause on or before said 11th day of January, 1890, and the defendant and its attorneys relied entirely upon the said certified copy of said order, so served on the defendant, touching the time when the defendant was required to answer and show cause why said conditional order should not be made absolute.

(3.) The said order making said conditional order absolute was inadvertently and unguardedly made and entered.

(4.) The answer of the defendant, which was submitted to the court at the same time with the said application, shows to the court good cause why said conditional order should not be made absolute and why said action should not be revived.

It is therefore ordered by the court that the said order of the 22nd day of January, 1890, purporting to make said conditional order absolute, be, and it hereby is, wholly vacated and set aside.

And thereupon, on the application of the defendant for that purpose, it is ordered by the court that leave of the court be, and it hereby is, given to the defendant to file forthwith its said answer to the rule to so show cause and its exhibits, affidavits, and evidence in support of said answer, and the said answer of the defendant to said rule to show cause, the affidavit of John Mills, and the certified transcript of certain proceedings in the probate court of Washington county, Ohio, in support of said answer were accordingly filed.

28 And thereupon this cause came on to be heard upon the said answer of the defendant to said rule to show cause and the exhibits and evidence in support of said answer, and the same was argued by counsel and submitted to the court.

On consideration whereof, and being fully satisfied in the premises, the court finds and adjudges that said answer and the exhibits and evidence in support thereof show to the court good and sufficient cause why the said conditional order should not be made absolute, and also why the said conditional order should be wholly vacated and set aside and the rule thereof discharged, and also why the said action should not be revived, and that this action has abated.

It is therefore ordered by the court that the said conditional order of revivor be, and the same is, wholly vacated and set aside and the rule thereof discharged; that the said motion or application for said revivor of this action be, and the same is hereby, overruled and denied; that the said order of revivor applied for be, and the same is hereby, refused, and that this action be, and it hereby is, stricken from the docket of the court.

To the foregoing findings and judgments of the court, "that said answer and the exhibits and evidence in support thereof show to the court good and sufficient cause why the said conditional order

should not be made absolute, and why said conditional order should be wholly vacated and set aside and the rule thereof discharged, and also why the said action should not be revived, and that this action has abated," the said E. W. Ellenwood duly excepted.

And to the order of the court, "that the said conditional order of revivor be, and the same is, wholly vacated and set aside and the rule thereof discharged; that the said motion or application
29 for said revivor of this action be, and the same is hereby, overruled and denied; that the said order of revivor applied for be, and the same is hereby, refused, and that this action be, and it hereby is, stricken from the docket of the court," the said L. W. Ellenwood duly excepted.

And afterwards, to wit, on the 27th day of May, A. D. 1891, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, 295.

Now comes the plaintiff, L. W. Ellenwood, as administrator of the estate of Latimer Bailey, deceased, and presents to the court his bill of exception in this cause and prays that the same may be allowed, signed, sealed, and made part of the record herein; and the court, finding that the said bill of exceptions is true and correct, does allow, sign, and seal the same and order the same to be filed and made part of the record; bond fixed at $250.00.

And afterwards, to wit, on the 27th day of May, A. D. 1891, the following bill of exception- is filed in the clerk's office of said court; said bill of exceptions is clothed in the words and figures following, to wit:

Bill of Exceptions.

Circuit Court of the United States, Southern District of Ohio, Eastern Division.

W. N. WALTON, Administrator of the Estate of Latimer Bailey, Deceased, Plaintiff,
30 *vs.*
THE MARIETTA CHAIR COMPANY, Defendant.

Plaintiff's bill of exceptions.

Be it remembered that this cause came on for hearing at the December term, 1890, of the circuit court of the United States, southern district of Ohio, eastern division, before Hon. George R. Sage, judge, upon the rule to show cause why the conditional order of revivor theretofore made by the court herein should not be made absolute; and the defendant, to maintain the issue on his part, offered and introduced a "certified transcript of the proceedings in the probate court of Washington county, Ohio, in support of the answer of defendant to rule to show cause," etc., which is hereto attached,

marked Exhibit "A," and made a part hereof; also the affidavit of John Mills, which is hereto attached, marked Exhibit "B," and made a part hereof; and this was all the exhibits and evidence offered by either party in the cause, and after argument of counsel the court made and entered its determination, judgment, and decision as follows, to wit:

In the Circuit Court of the United States of America, Southern District of Ohio, Eastern Division.

W. N. WALTON, Administrator of the Estate of Latimer Bailey, Deceased, a Citizen of the State of New Jersey, Plaintiff,
vs.
THE MARIETTA CHAIR COMPANY, a Corporation Created and Existing under the Laws of the State of Ohio, Having its Principal Office and Place of Business in the County of Washington and State of Ohio, Defendants.

31 *Entry.*

And thereupon this cause came on to be heard upon the said answer of the defendant to said rule to show cause and the exhibits and evidence in support of said answer, and the same was argued by counsel and submitted to the court.

On consideration whereof, and being fully satisfied in the premises, the court finds and adjudges that said answer and the exhibits and evidence in support thereof show to the court good and sufficient cause why the conditional order should not be made absolute, and also why the said conditional order should be wholly vacated and set aside and the rule thereof discharged, and also why the said action should not be revived, and that this action has abated.

It is therefore ordered by the court that the said conditional order of revivor be, and the same is, wholly vacated and set aside and the rule thereof discharged; that the said motion or application for said revivor of this action be, and the same is hereby, overruled and denied; that the said order of revivor applied for be, and the same is hereby refused, and that this action be, and it is hereby, stricken from the docket of the court.

To the foregoing findings and judgments of the court, "that said answer and the exhibits and evidence in support thereof show to the court good and sufficient cause why the said conditional order should not be made absolute and why said conditional order should be wholly vacated and set aside and the rule thereof discharged, and also why the said action should not be revived, and that the action has abated," the said L. W. Ellenwood duly excepted and prays the court that this his exception may be signed, sealed, and made part of the record.

32 And to the order of the court, "that the said conditional order of revivor be, and the same is, wholly vacated and set aside and the rule thereof discharged; that the said motion or application for said revivor of this action be, and the same is hereby,

overruled and denied; that the said order of revivor applied for be, and the same is, refused, and that this action be, and it hereby is, stricken from the docket of the court," the said L. W. Ellenwood duly excepted and prays the court that this his exception may be signed, sealed, and made a part of the record.

And thereupon the said L. W. Ellenwood tendered this bill of exceptions, which is accordingly allowed, signed, sealed, and ordered filed and made a part of the record in the case this 27th day of May, A. D. 1891.

GEO. R. SAGE,
U. S. Dist. J., S. D. O.

EXHIBIT "A."

STATE OF OHIO, }
Washington County, } ss:

In the Probate Court of said County.

In the Matter of the Estate of LATIMER BAILEY, Deceased.

Be it remembered that heretofore, to wit, on the 26th day of January, A. D. 1887, came W. N. Walton and made application to said court to be appointed administrator of the estate of Latimer Bailey, deceased, late of New York city; which application was in the words and figures following to wit:

33 *Application for Letters of Administration.*

THE STATE OF OHIO, }
Washington County, } ss:

In Probate Court.

Wm. N. Walton, being duly sworn, says that Latimer Bailey, a resident of the city of New York, died on or about the 4th day of May, A. D. 1885, and that there is not, to the knowledge of this affiant, any last will and testament of said decedent. Said Latimer Bailey was a non-resident of the State of Ohio, and this appointment is made to prosecute a suit or suits in this county.

Name.	Degree of kinship.	P. O. address.

The undersigned asks to be appointed administrator of the estate of said decedent, and on his oath aforesaid says that there is no personal property in this county of said decedent and no real estate, and offers a bond in the sum of $100.00, with —— —— and —— —— as sureties thereon.

W. N. WALTON.

Sworn to and subscribed before me this 26th day of Jan., A. D. 1887.

F. J. CUTTER,
Probate Judge.

Endorsed on cover: G. 300. In the matter of the estate of Latimer Bailey, deceased. Application for letters of administration. Filed Jan. 26, A. D. 1887.

34 And thereupon the following entry and order was made by the judge of said court and entered upon the journal of said court, to wit:

WEDNESDAY, *Jan.* 26, 1887.

The court met pursuant to adjournment.
Present: F. J. Cutter, judge of said court.

In the Matter of the Estate of LATIMER BAILEY, Deceased.

Adm'r App't'd.

This day came W. N. Walton and made application to be appointed administrator of the estate of Latimer Bailey, late of New York city, deceased.

It appearing that the said Latimer Bailey died intestate and that it is expedient that an administrator should be appointed upon said estate, it is therefore by the court ordered that the said W. N. Walton be and is hereby appointed administrator of the estate of Latimer Bailey, deceased, and it is further ordered that the said W. N. Walton enter into a bond in the sum of $100.00, with approved sureties, according to law.

Thereupon court adjourned to Thursday, January 27, 1887, at 8 o'clock a. m.

Attest:

F. J. CUTTER,
Probate Judge.

And thereupon, afterwards, to wit, on the 27th day of January, A. D. 1887, said W. N. Walton filed in said court his bond; which bond is in the words and figures following, to wit:

35 *Administrator's Bond.*

Know all men by these presents that we, William N. Walton and ——— ———, are held and firmly bound unto the State of Ohio in the penal sum of one hundred dollars, to the payment of which we do hereby, jointly and severally, bind ourselves, our heirs, executors, and administrators, if default be made in the condition following:

Whereas letters of administration upon the estate of Latimer Bailey, deceased, were granted to the said William N. Walton by the probate court of Washington county, in the State of Ohio, on the 26th day of January, A. D. 1887: Now, if said William N. Wal-

ton, as administrator of the estate of said Latimer Bailey, deceased, shall—

First. Make and return into said court on oath, within three months, a true inventory of all the moneys, goods, chattels, rights, and credits of the deceased that are by law to be administered and which have or shall come to his possession or knowledge, and also, if required by said court, an inventory of the real estate of said deceased;

Second. Shall administer according to law all the said moneys, goods, chattels, rights, and credits of the said deceased and the proceeds of all his real estate that may be sold for the payment of his debts, which shall at any time come to the possession of said administrator or to the possession of any other person for him;

Third. Shall render, upon oath, a just and true account of his administration, within eighteen months, and at any other time when required by said court or the law, and, failing so to do for
36 thirty days after he shall have been notified of the expiration of the time by the probate judge, shall receive no allowance for his services unless the court shall enter upon its journal that such delay was necessary and reasonable;

Fourth. Shall pay any balance remaining in hands upon the settlement of his accounts to such persons as said court or the law shall direct:

Fifth. Shall deliver the letters of administration into court in case any will of said deceased shall be hereafter duly proved and allowed; and—

Sixth. Shall in all things else faithfully perform — and singular his duties as such administrator, as required by law, then this obligation to be void; otherwise to be and remain in full force and effect.

Sealed with our seals and dated at Marietta, Ohio, this 26th day of January, A. D. 1887.

W. N. WALTON. [SEAL.]
A. J. FRAME. [SEAL.]

Executed in presence of—
WM. S. WILSON.
D. H. MOORE.

Acknowledgement of Sureties.

THE STATE OF OHIO, } ss:
Athens County, }

Be it remembered that on this 27th day of January, A. D. 1887, personally appeared before the undersigned A. J. Frame, surety on the foregoing bond of W. N. Walton, as administrator, and acknowledged that he did sign and seal said bond as surety.

WM. S. WILSON,
Probate Judge, Athens Co., O. [SEAL.]

37 Endorsed on cover: Doc. —, page —. Washington county probate court. Wm. N. Walton, administrator of the estate of Latimer Bailey, dec'd. Bond, $100.00. Filed 27th day of January, 1887. F. J. Cutter, probate judge.

Order of Probate Court.

Ordered that on all bonds taken in this court there shall not be less than two sureties, who must be residents of this county, and such sureties on each bond must, in the aggregate, own in their own right real estate situate in this county, liable to execution, the actual value of which over and above their debts, liabilities, to the penal sum for which the bond is given. Journal K, p. 434. Recorded vol. D, page 593.

And thereupon, on said 27th day of January, A. D. 1887, the following entry and order was made by the judge of said court and entered upon the journal of said court, to wit:

THURSDAY, *January* 27, 1887.

The court met pursuant to adjournment.
Present: F. J. Cutter, judge of said court.

In the Matter of the Estate of LATIMER BAILEY, Deceased.

This day came W. N. Walton, heretofore appointed administrator of the estate of Latimer Bailey, deceased, and filed herein his bond in the sum of one hundred dollars, with A. J. Frame as sure*ties;* which bond is approved and ordered recorded.

It is further ordered that letters of administration issue to
38 the said W. N. Walton, as such administrator.

And thereupon, on said 27th day of January, A. D. 1887, letters of administration issued to said W. N. Walton; which letters of administration are in the words and figures following, to wit:

THE STATE OF OHIO, } ss:
Washington County, }

To all to whom these presents shall come, Greeting:

Whereas it appearing to the probate court within and for the county aforesaid that Latimer Bailey, late of said county of Washington and State of Ohio, died intestate, and that it is expedient that administration of all and singular the goods, chattels, moneys, rights, and credits of the said Latimer Bailey, deceased, whereof he died possessed should be committed to some proper and suitable person or persons—

Know ye, therefore, that the said probate court hath nominated and appointed, and by these presents doth nominate and appoint, William N. Walton administrator of all and singular the goods, chattels, moneys, rights, and credits of the said decedent, hereby granting to said William N. Walton, as said administrator, all and singular the power necessary and by law required to enable him to take an inventory of the estate of said decedent; to collect, receive, sue for, and recover all and singular the goods, chattels, moneys, rights, and credits of said decedent and the proceeds of the real estate of the decedent which may be sold to pay debts, and out of such portion

thereof as shall come to his hands the debts of the said decedent to pay and discharge according to law, and of the residue thereof remaining after the payment of said debts and the costs of administration to make distribution as the court or the law shall
39 direct, and the said estate in all respects to fully administer agreeably to law.

In testimony whereof I have hereunto set my hand and affixed the seal of said probate court, at Marietta, this 27 day of January, A. D. 1887.

F. J. CUTTER,
Probate Judge.

[SEAL.]

Certificate to Copies.

Probate Court.

THE STATE OF OHIO, } ss:
Washington County, }

I, William H. Luper, judge and *ex officio* clerk of the probate court within and for the county of Washington and State of Ohio, do hereby certify that the foregoing is a true copy of the application for letters of administration, administrator's bond, letters of administration, and journal entries in matter of appointment of Wm. N. Walton as administrator of Lattimer Bailey as the same appear upon the records of said court, and I further certify that I have carefully compared the foregoing copy with the original record, and that the same is a full and correct transcript thereof.

In witness whereof I have hreunto set my hand and affixed the seal of said probate court, at Marietta, Ohio, this 16th day of June, A. D. 1890.

WM. H. LUPER,
Probate Judge and ex Officio Clerk of said Court. [SEAL.]

40 EXHIBIT "B."

STATE OF OHIO, } ss:
Washington County, }

John Mills, being first duly sworn, says that he is the president of The Marietta Chair Company, defendant in the action now pending in the circuit court of the United States for the southern district of Ohio, eastern division, entitled W. N. Walton, administrator of Latimer Bailey, deceased, *versus* The Marietta Chair Company; that said Marietta Chair Company is and always has been a citizen and resident of the State of Ohio; that said L. W. Ellenwood, who has appeared in said action, is and always has been a citizen and resident of the State of Ohio; said Latimer Bailey died May 4, 1885, in the State of New York, and was at the time of his death and for many years theretofore a citizen and resident of the State of New York; said W. N. Walton never was the husband or widow or next of kin of said Latimer Bailey nor a creditor of said Latimer Bailey.

JNO. MILLS.

Subscribed in my presence and sworn to before me this 16th day of June, A. D. 1890.

[SEAL.] JOHN H. SNODGRASS,
Notary Public.

And afterwards, to wit, on the 19th day of June, A. D. 1891, the following error bond was filed in the clerk's office of said court clothed in the words and figures following, to wit:

Error Bond.

41 Circuit Court of the United States, Southern District of Ohio, Eastern Division.

W. N. WALTON, Adm'r,
vs.
THE MARIETTA CHAIR CO. } # 459.

Know all men by these presents that we, L. W. Ellenwood, as principal, and J. A. Plumer and J. P. Ward, as sureties, are held and firmly bound unto The Marietta Chair Co. in the sum of two hundred and fifty (250) dollars, to be paid to the said The Marietta Chair Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 10th day of June, 1891.

Whereas the above-named L. W. Ellenwood, as adm'r of the estate of Latimer Bailey, dec'd, has taken out a writ of error to the Supreme Court of the United States of America to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of Ohio:

Now, therefore, the condition of this obligation is such that if the above-named L. W. Ellenwood, adm'r as aforesaid, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

L. W. ELLENWOOD. [SEAL.]
J. A. PLUMER. [SEAL.]
J. P. WARD. [SEAL.]

42 Sealed and delivered in presence of—
B. B. STONE.
A. L. SMITH.

The above security is approved.

GEORGE R. SAGE,
District Judge of the United S., S. D. Ohio.

STATE OF OHIO, *Washington County,* } ss:

J. A. Plumer and J. P. Ward, sureties, whose names are signed to the within bond, being duly sworn, on oath say, severally, as follows: He, the said J. A. Plumer, says that he is worth at least the sum of five hundred dollars over and above all his just debts and liabilities; and he, the said J. P. Ward, says that he is worth at least the sum of five hundred dollars over and above all his just debts and liabilities.

J. A. PLUMER.
J. P. WARD.

Taken, sworn to, and subscribed before me, a notary public in and for said county, this 13 day of June, 1891. Witness my hand and official seal.

A. L. SMITH,
[SEAL.] *Notary Public, Washington County, Ohio.*

43 And afterwards, to wit, on the 20th day of June, 1891, the following assignment of error was filed in the clerk's office of said court; said assignment of error is clothed in the words and figures following, to wit:

Assignment of Error.

Supreme Court of the United States.

W. N. WALTON, Administrator of the Estate of Latimer Bailey, Deceased, Plaintiff,
vs.
THE MARIETTA CHAIR COMPANY, Defendant.

Of October term, in the year of our Lord one thousand eight hundred and ninety-one.

And now, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes L. W. Ellenwood, by his attorneys, John A. Hutchinson, Dave D. Johnson, and E. L. De Witt, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1. The court erred in finding and adjudging that the answer to the rule to show cause why the conditional order of revivor should not be made absolute and the exhibits and evidence in support thereof s-ow good and sufficient cause why the conditional order should not be made absolute, and also why the said conditional order should be wholly vacated and set aside and the rule thereof discharged, and also why the said action should not be re-
44 vived, and that this action had abated.

II. The court erred in vacating and setting aside the conditional order of revivor theretofore made by said court and in discharging the rule thereof.

III. The court erred in denying and overruling the motion or application of the said L. W. Ellenwood for a revivor of the action.

IV. The court erred in refusing the order of revivor applied for and in striking the action from the docket of the court.

V. The said judgment was given in favor of the said The Marietta Chair Company, whereas by the laws of the land it ought to have been given in favor of the said L. W. Ellenwood; wherefore the said L. W. Ellenwood prays that a citation may issue, and that the said finding, order, and judgment may be reversed, annulled, and held for nothing, and that he may be restored to all things he has lost by reason thereof.

By JNO. A. HUTCHINSON,
DAVE D. JOHNSON, AND
E. L. DE WITT,
Attorneys for Plaintiff in Error.

45 THE UNITED STATES OF AMERICA, }
Southern District of Ohio, Western Division, } *ss:*

I, Benjamin R. Cowen, clerk of the circuit court of the United States within and for the division and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above-entitled cause as the same appears of record and on file in the clerk's office of said court in said cause.

Seal of the Circuit Court, South'n Dist. of Ohio.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Cincinnati, O., this 27th day of June, A. D. 1891.

B. R. COWEN, *Clerk,*
By JANIE W. COWEN.
Deputy Clerk.

O K.
J. W. F. C.

46 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of Ohio, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between W. N. Walton, adm'r of the estate of Latimer Bailey, d'c'd, and The Marietta Chair Company, a manifest error hath happened, to the great damage of the said W. N. Walton, adm'r as aforesaid, plaintiff, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the

United States, together with this writ, so that you may have the same at the city of Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 20th day of June, 1891, in the year of our Lord one thousand eight hundred and ninety-one.

B. R. COWEN,
Clerk of the Circuit Court of the U. S., S. D. O.

[Endorsed:] United States circuit court, southern dist. of Ohio, E. D. No. 459. W. N. Walton, adm'r, *vs.* The Marietta Chair Company. Writ of error. Filed —— —, 18—. —— ——, clerk.

47 THE UNITED STATES OF AMERICA, *ss:*

To The Marietta Chair Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Ohio, wherein W. N. Walton, adm'r of the estate of Latimer Bailey, deceased, is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 20th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

GEO. R. SAGE,
U. S. District Judge within and for the Southern Dist. of Ohio, Sitting and Holding Circuit Court for said District, there being no Circuit Judge or Associate Justice in said District.

E. L. DE WITT,
B'd of Tr. Bldg.

48 [Endorsed:] United States circuit court, southern dist. of Ohio, E. D. No. 459. W. N. Walton, adm'r, *vs.* The Marietta Chair Company. Citation to defendant in error. Filed —— — 18—. —— ——, clerk.

THE UNITED STATES OF AMERICA, *Southern District of Ohio,* } *ss:*

Received this writ at Cincinnati, Ohio, on 27th day of June, A. D 1891, and on the 30th day of June, A. D. 1891, at Marietta, Ohio, I

delivered to John Mills, president of the Marietta Chair Company, and to John J. Garry, secretary of said company, each personally, true and certified copies of this writ, having the endorsements thereon.

JOHN H. SIMMONS,
U. S. Marshal, S. D. O.,
By WM. BETTS, *Deputy.*

Two copies	1 00
Two services	4 00
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Endorsed on cover: Case No. 14,750. S. Ohio C. C. U. S. No. 234. W. N. Walton, administrator of the estate of Latimer Bailey, deceased, plaintiff in error, *vs.* The Marietta Chair Company. Filed July 18th, 1891.

158-185
JAMES H. MCKENNEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 234.

W. N. WALTON, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE MARIETTA CHAIR COMPANY.

MOTION TO AMEND AND BRIEF IN SUPPORT THEREOF.

EDWARD B. WHITNEY,
Counsel for L. W. Ellenwood.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 234.

W. N. WALTON, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE MARIETTA CHAIR COMPANY.

MOTION TO AMEND.

Comes now L. W. Ellenwood, by his counsel, and moves the Court to amend the writ of error in the cause now entitled as above by striking out the words "W. N. Walton" at each of the two places where said words are found in said writ of error and substituting therefor the words "L. W. Ellenwood."

EDWARD B. WHITNEY,
Counsel for L. W. Ellenwood.

BRIEF IN SUPPORT OF MOTION TO AMEND.

This was a case originally brought by W. N. Walton, administrator, &c., against The Marietta Chair Company. Pending the action, Walton's letters testamentary were revoked, and L. W. Ellenwood, having been appointed administrator in his stead, was substituted as party plaintiff (Record, p. 13). The papers in the case continued to bear the caption "W. N. Walton, administrator, &c., plaintiff, *vs.* The Marietta Chair Company, defendant," notwithstanding this change of parties. Subsequently the court set aside the order reviving the action in the name of Ellenwood and directed that the action "be, and hereby is, stricken from the docket of the court" (p. 16). L. W. Ellenwood excepted and filed a bill of exceptions (pp. 17–19). He applied for a writ of error, filed assignments of error (pp. 25–'6), and duly executed a bond reciting that he "had taken out a writ of error to the Supreme Court," &c., which bond was approved by the court (p. 24).

The writ of error correctly described the plaintiff in error so far as the words "administrator of the estate of Latimer Bailey, deceased," were concerned, but by evident clerical error named as the administrator not L. W. Ellenwood, but W. N. Walton, the original administrator, whose letters long since had been revoked, and who at that time, as defendants well knew, had no connection with the case.

The record thus shows very clearly who the real plaintiff in error was, and shows that the mistake was a merely clerical one.

Under Revised Statutes, § 1005, this Court may "allow an amendment of a writ of error * * * when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the

accompanying record, and in all other particulars of form." Had there been a blank before the word "administrator" in the writ of error, there could be no doubt that the name of the plaintiff would be inserted by leave of the court. The fact that the wrong man's name was written in cannot make this defect one other than of form. For somewhat similar amendments see *Knickerbocker Life Insurance Company vs. Pendleton*, 115 U. S., 339; *Estis vs. Trabue*, 128 U. S., 225; *United States vs. Schoverling*, 146 U. S., 76, 82.

Even under the strict old common-law system of pleadings, a misnomer of the plaintiff was not pleadable in bar if the defendant was aware by whom he was being sued (1 Chitty on Pleading, p. 266), while a mistake by writing the name of the plaintiff instead of that of the defendant was aided by the verdict (*id.*, pp. 271, 272). The case is one within the maxim *falsa demonstratio non nocet.* (See Broom's Legal Maxims, pp. 627, 639, 640.)

It may be suggested that there is further irregularity in the fact that Mr. Ellenwood, like Mr. Walton, appears on the record only by initials. This, however, is sufficient. "He may have had no Christian name." (*Breedlove vs. Nicolet*, 7 Pet., 413, 431.)

The undersigned does not understand that the court will look into the merits on the present motion. When the case comes to be heard on the merits it will be submitted upon principle and authority that the order adjudging that the action had abated and striking it from the docket, &c., was a final judgment from which a writ of error could lie; that the order, made at the time and under the circumstances disclosed by the present case, was not discretionary, but that plaintiff had the right to have the cause tried on its merits; that Walton's letters of administration (for alleged nullity of which the action was declared abated) were *prima facie* valid and could not be collaterally attacked, especially upon such a motion; that the probate court in Washington county, Ohio, which granted the letters, was a

court of record, and its proceedings were to be accorded the same respect as those of any other court; that the defects in the papers in the probate court were mere irregularities, and that, it appearing that the estate of the deceased had a claim against the defendant in this action, there was jurisdiction in the probate court to grant the letters for the purpose of prosecuting the action, and that this jurisdiction (if necessary to appear affirmatively on the papers) sufficiently appeared in the application for the letters.

It is therefore respectfully submitted that the amendment should be allowed.

EDWARD B. WHITNEY,
Counsel for L. W. Ellenwood.

158-105

MAR 4 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

W. N. WALTON, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE MARIETTA CHAIR COMPANY, DEFENDANT IN ERROR.

No. 14,750.
No. 234, of October term 1894.

In Error to the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

MOTION TO DISMISS WRIT OF ERROR.

HARRISON, OLDS & HENDERSON and A. D. FOLLETT,
Attorneys for Defendant in Error.

Supreme Court of the United States.

W. N. WALTON, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE MARIETTA CHAIR COMPANY, DEFENDANT IN ERROR.

No. 14,750.
No. 234, of October term 1894.

In Error to the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

MOTION TO DISMISS WRIT OF ERROR.

HARRISON, OLDS & HENDERSON and A. D. FOLLETT,
Attorneys for Defendant in Error.

Supreme Court of the United States.

W. N. WALTON, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR, *VS.* THE MARIETTA CHAIR COMPANY, DEFENDANT IN ERROR.	No. 14,750. No. 234, of October Term 1894.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

MOTION TO DISMISS WRIT OF ERROR.

The Defendant in error, The Marietta Chair Company, now comes for the purposes of this motion only, and not entering its appearance in this action except for the purposes of this motion only, and moves the Court to dismiss the writ of error herein, and for cause therefor says:

The action in the Court below was brought by W. N. Walton in his alleged representative capacity of Administrator of the estate of Latimer Bailey, deceased; and the alleged cause of action was one arising in the life-time of Bailey, who is alleged to have died May 4, 1885. The original petition was filed in the Court below November 30, 1887, and the amended petition June 22, 1888.

The jurisdiction of the Court below was based solely upon the allegations contained in both the original and amended petition, that Walton was a citizen of New Jersey and the Defendant was a citizen of Ohio.

The issues tendered by the amended petition were made up by that pleading, the answer and the reply. Among the averments of the amended petition that were denied by the answer were the aver-

ments that Walton was the duly appointed and qualified Administrator of the estate of Bailey under and by proper proceedings had in the Probate Court of Washington County, Ohio, and that Walton was a citizen of New Jersey. One of the issues was, therefore, whether or not Walton was or was not the Administrator of Bailey; and another issue was whether Walton was or was not a citizen of New Jersey.

On December 12, 1889, after the issues were made up and before trial, one L. W. Ellenwood appeared in the action and suggested to the court below that Walton had been removed from the office of Administrator of Bailey, that his letters of administration had been revoked, and that he, Ellenwood, had been duly appointed and qualified as Administrator of the estate of Bailey; and the court, being then satisfied of the truth of such suggestion, did, on the motion of Ellenwood, order that the action stand revived in the name of *Ellenwood as such Administrator*, and proceed in his favor, unless sufficient cause be shown against such revivor on or before the 11th day of *January*, 1890, after the service of *said order* upon the defendant. A duly certified copy of what purported to be the said conditional order of revivor was served upon the defendant, but such pretended copy notified and directed the defendant to answer the rule of such conditional order, and show cause, if any, to the court, on or before the 11th day of *June*, 1890, why such conditional order should not be made absolute. The mistake in this pretended copy served upon the defendant, and the discrepancy between it and the order of the court *as made and entered on its journal*, touching the time within which the defendant should or might show cause, if any, why such conditional order should not be absolute, not having then come to the notice or attention of the court, and it then erroneously appearing to the court that the conditional order of revivor, as made and entered by the court, had been duly served upon the defendant, and no cause against such revivor being then shown to the court, the court on the 22d day of January, 1890, ordered that the action stand revived in the name of said *Ellenwood as the Administrator of the estate of Bailey*, and proceed in his name as such Administrator.

The defendant and its attorneys at the time resided far distant from where the court below sits and its records were and are kept, and had no knowledge whatever, till long after the 22d day of January, 1890, and shortly before the 11th day of *June*, 1890, that the said conditional order, *as entered of record*, notified and directed the defendant to so answer and show cause on or before the 11th day of *January*, 1890; and the defendant and its attorneys relied entirely upon the said certified copy so served on the defendant, of what purported to be said conditional order, touching the time when the de-

fendant was required to answer and show cause why said conditional order should not be made absolute.

At once upon discovering the order making absolute such conditional order, and prior to the said 11th day of *June*, 1890, the defendant made application to the court below in open court to set aside and vacate said order of the 22d day of January, 1890, making, or purporting to make, absolute said conditional order, the defendant at the same time submitting to the court its answer showing cause why said conditional order should not be made absolute. Said application was subsequently granted by the court on the 9th day of February, 1891, when the said order making absolute such conditional order was wholly vacated and set aside by an order of the court then made and entered.

Thereupon, the court granted leave to the defendant to file forthwith its answer to the rule to show cause and its exhibits, affidavits and evidence in support of said answer; and the said answer, the affidavit of John Mills, and the certified transcript of certain proceedings in the Probate Court of Washington County, Ohio, in support of said answer were accordingly filed.

And thereupon the cause came on to be heard upon the said answer to the rule to show cause and upon the exhibits and evidence in support of the same, (no one of the facts or matters set forth in such answer, exhibits and evidence being controverted by the said Ellenwood, either as such Administrator or otherwise, and all of such facts and matters being thereby admitted to be true), and the said Ellenwood having offered or introduced no evidence whatever against the said answer, and he not having even made profert of his or any letters of Administration, the same was argued by Counsel and submitted to the Court; on consideration whereof, the Court found and adjudged that said answer and the exhibits and evidence in support therof showed to the court good and sufficient cause why the said conditional order should not be made absolute and also why the said conditional order should be wholly vacated and set aside and the rule thereof discharged, and also why the said action should not be revived, and that the action had abated. It was thereupon ordered by the court that the said conditional order of revivor be, and the same thereby was, wholly vacated and set aside and the rule thereof discharged; that the said motion or application for said revivor of the action be, and the same was thereby, overruled and denied; that the said order of revivor applied for be, and the same thereby was, refused: and that the action be, and the same thereby was stricken from the docket of the court.

These orders were against *Ellenwood in his capacity as such Administrator as aforesaid*, and not otherwise. *Ellenwood* in his *indi-*

vidual capacity, but not otherwise, *excepted to* these orders and judgment of the court. The court below made and rendered no order or judgment against *Walton either as such Administrator of Bailey or otherwise.* He had been removed from the office of Administrator of the estate of Bailey and had ceased to be such Administrator, and the action had thereby abated.

Ellenwood as *such Administrator* took a Bill of Exceptions, and thereby brought upon the record the Exhibits, Affidavits and evidence offered and introduced in support of the defendant's answer showing cause etc., which evidence consisted of—(*a*) the said certified transcript of the proceedings in the Probate Court of Washington County, Ohio, and (*b*) the said affidavit of John Mills, which were all the exhibits and evidence offered in the case.

The court below fixed the amount of the error bond, but the order of the court did not show *whose* bond it was to be, or *by whom* it was to be given, if given. An error bond was actually given by *Ellenwood* in his *individual* capacity, and none was given by him as *such Administrator*; but the bond given recited that he, Ellenwood, as *Administrator of the estate of Bailey* has taken out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the action as it was entitled in the Court below. The condition of the bond "is such that if the above named L. W. Ellenwood Adm'r. as aforesaid, shall prosecute his said writ of error to effect and answer all costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue."

The assignment of errors, which was filed June 20, 1891, is by Ellenwood in his individual capacity, and the prayer therein for a citation was also by him in his individual capacity.

The writ of error, or so much of it as is material to the present motion, (omitting the caption, which is in the usual form), is as follows: "Because in the records and proceedings, and also in the rendition of a judgment of a plea which is in the said Circuit Court, before you, between W. N. Walton, Adm'r. of the estate of Latimer Bailey, dec'd, and The Marietta Chair Company, a manifest error hath happened to the great damage of the said W. N. Walton, Adm'r. as aforesaid as by his complaint appears. We being willing that the error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you" etc. The writ of error was issued by the Clerk of the Circuit Court.

The citation which was directed to, and was served upon, the defendant, (omitting the caption and the teste), is as follows: "You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the City of Washington,

within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Circuit Court of the United States for the Southern District of Ohio, wherein W. N. Walton Adm'r. of the estate of Latimer Bailey deceased is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf."

Walton as Administrator of the estate of Bailey appears to be the plaintiff in error in this action not only by the writ of error, the transcript filed, and the docket of this Court in respect to the action, but also by the title of this action; but he is not a proper plaintiff in error, and cannot be such, since no order or judgment was made or rendered against him by the Court below.

The record as printed does not show that the writ of error was ever served by lodging the original or any copy thereof with the Clerk of the Circuit Court. On the contrary the record on page 27 shows the blanks, where the date of filing of the writ of error in the office of the Clerk of the Circuit Court should appear, to be unfilled, and therefore that the writ was never filed.

The defendant in error, therefore, asks that the writ of error be dismissed upon the following grounds, viz:

1. The transcript of the record as printed, fails to show that the writ of error, or authenticated transcript, or the prayer for reversal, or the citation, were any of them returned and filed with this Court as required.

2. The transcript of the record, which has been printed, fails to show service of the writ of error.

3. The writ of error does not set forth in the statement of the parties thereto the name of the sole party against whom the orders or judgments complained of were made or rendered, but, on the contrary, it does set forth the name of one as Plaintiff who was not such at the time such orders or judgments were made or rendered and against whom such orders or judgments were not rendered; and said defect cannot be remedied by reference to the accompanying record.

4. The writ of error does not set forth the name of the party suing out the same, or of the sole party against whom the orders or judgments complained of were made or rendered; but, on the contrary, it is, or purports to be, the writ of error of one against whom such judgments or orders were not rendered.

5. If writ of error were amendable in any or all of the respects above mentioned, this court ought not, in the exercise of a sound discretion, to allow the writ to be amended, if amendment shall be applied for, (and amendment has not yet been applied for), since the questions presented by the record have been decided by this Court,

and the granting of amendent would lead only to unnecessary delay and expense.

The defendant in error also moves the Court to affirm the orders and judgments of the Court below.

HARRISON, OLDS & HENDERSON and A. D. FOLLETT,
Attorneys for The Marietta Chair Co.,
Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 234.

W. N. WALTON, Administrator of the Estate of Latimer Bailey, Deceased, Plaintiff in Error,

vs.

THE MARIETTA CHAIR COMPANY.

REPLY BRIEF ON MOTION TO AMEND.

The undersigned moved on March 4, 1895, to amend by substituting the name of L. W. Ellenwood for that of W. N. Walton in the writ of error. No appearance had been entered on behalf of defendant in error, but informal notice was given to its local counsel. Counsel appeared on March 4 and asked to submit a motion to dismiss or affirm. To this motion the undersigned was obliged to object on the ground of lack of notice, desiring to argue the merits of the case orally. If the amendment is allowed, the case will be reached within two or three weeks on the regular call.

Defendant in error now files its brief on the motion to dismiss as a brief in opposition to the motion to amend, and the undersigned respectfully submits this reply brief thereto according to the leave granted by the Court.

Defendant in error states in his brief that he has also filed an affidavit concerning the true name of L. W. Ellenwood. The undersigned respectfully objects to the reception of this affidavit. Papers cannot be received which were not used at the hearing. (*Hudgins vs. Kemp*, 18 How., 530.)

The following suggestions made by counsel for defendant in error are not referred to in the brief formerly filed on behalf of Mr. Ellenwood:

I. That the writ was not returned within thirty days. It was returned July 18, 1891, which was twenty-eight days after its issuance.

II. That the clerk omitted to indorse the filing of the writ in the court below. From this defendant assumes that the writ was not filed. It is, however, recited by Judge Sage to have been filed (see citation, Record, p. 27). This recital should be presumptive evidence of filing, just as his signing the citation and approving the bond is evidence of his having allowed the writ (see *Credit Co. vs. Arkansas Central Railway*, 128 U. S., 258, and cases cited). The citation was duly served on two of defendant's officers, so that defendant had full notice of the proceeding. Doubtless the file-mark was inadvertently omitted or the copy marked "filed" was lost or served with the citation. No statutory requirement was omitted.

III. Defendant objects because Ellenwood is not every time recited in the record to be administrator, etc. There is no statutory or other requirement of such extreme technicality. He is properly named in the body of the bond and in the other places where a full description is necessary (the writ of error and citation alone excepted). As to the exceptions and bill of exceptions, it may be remarked that neither an exception nor a bill of exceptions was necessary at all in the present case. The judgment or order of the court is part of the record and so are the papers upon which this judgment or order was granted. These papers were all filed (p. 16). It is unnecessary to cite authority to the effect that errors shown by the record do not need a bill of exceptions.

IV. It is also suggested that Ellenwood is a citizen of Ohio, the same State with the defendant. This does not divest jurisdiction, the original administrator having been a citizen of a different State. (*Clarke vs. Mathewson*, 12 Pet., 164; *Hardenbergh vs. Ray*, 151 U. S., 112, 118.)

Respectfully submitted.

EDWARD B. WHITNEY,
Of Counsel for L. W. Ellenwood.

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JAMES H. MCKENNEY,

Case No. 14,750.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 234.

LOWELL W. ELLENWOOD, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

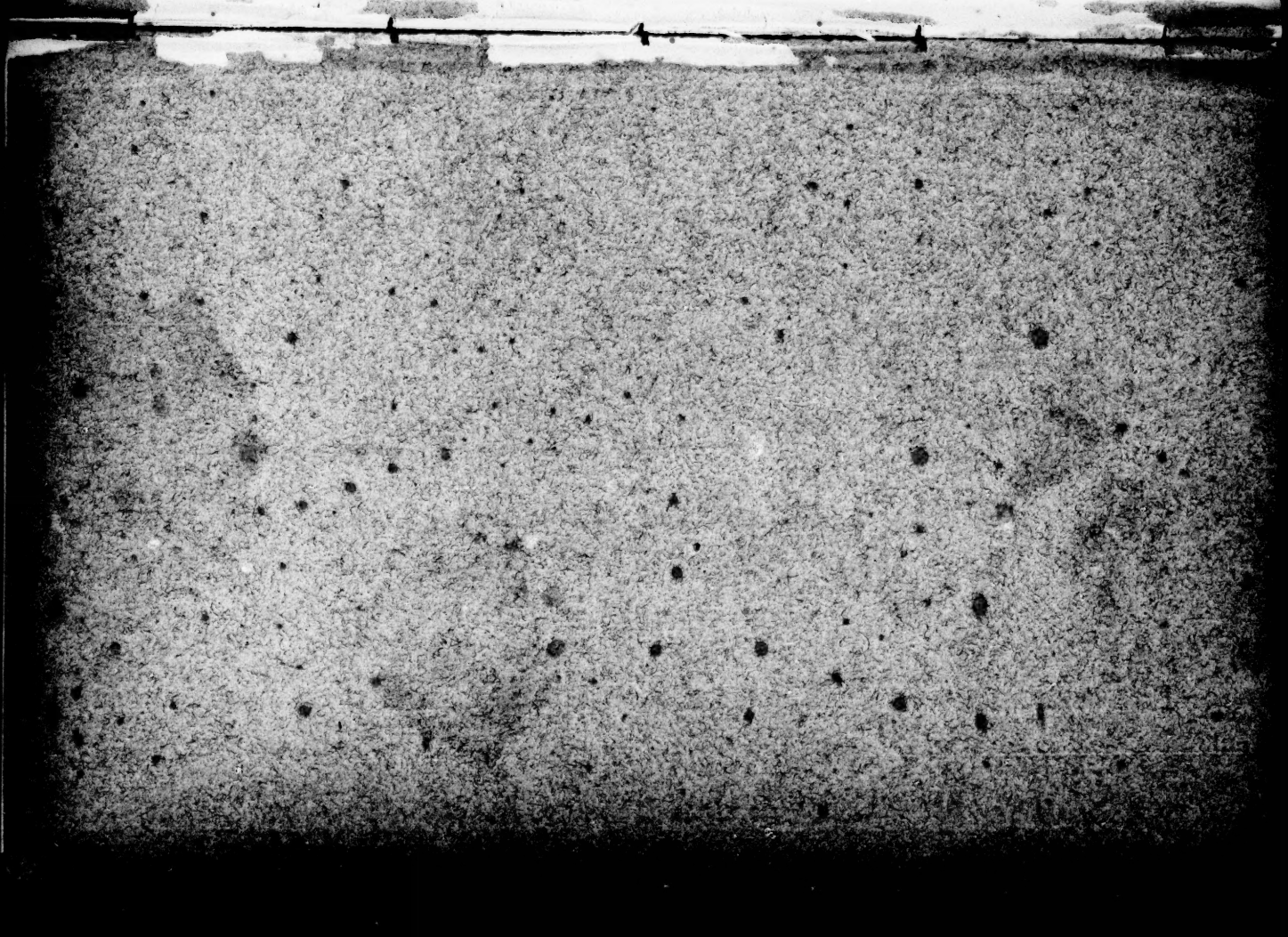
THE MARIETTA CHAIR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD B. WHITNEY,
Of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



Case No. 14,750.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1894.

No. 234.

LOWELL W. ELLENWOOD, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR,

vs.

THE MARIETTA CHAIR COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

Plaintiff in error was appointed administrator of the above-named deceased in place of one W. N. Walton, removed. On qualifying, he found an action pending between Walton as administrator and The Marietta Chair

Company. He applied for an order reviving the action in his own name as administrator, and obtained such order. Subsequently the court revoked the order and entered an order or judgment declaring the action abated and striking it from the docket of the court. Mr. Ellenwood prosecutes this writ of error.

STATEMENT OF FACTS.

Latimer Bailey, a citizen of the State of New York, died May 4, 1885 (p. 19). W. N. Walton, a citizen of New Jersey, was on January 27, 1887, appointed administrator of his estate by the probate court of Washington county, Ohio (p. 20). Defendant is a corporation organized under the laws of the State of Ohio (p. 9.) On November 24, 1887, Walton as such administrator filed his petition in an action of tort against the said chair company, demanding judgment for $10,000 (pp. 1, 2). The action having been duly commenced by service of summons, an amended petition was filed by order of court June 22, 1888, which sets forth more definitely the cause of action (pp. 7–9). Defendant answered the amended petition on August 8, 1888, pleading a general denial (except as to its own incorporation and citizenship), and also pleading the statute of limitations. Plaintiff replied to the latter defense, and issue was thus joined (pp. 9–11).

The cause was on the docket for the June, 1889, term of court, and was continued. Thereafter, and prior to December 12, 1889, Walton was removed from his office as administrator, and Ellenwood was duly appointed and qualified in his place (p. 12). No defect in the removal proceedings or in the appointment of Ellenwood has been suggested.

On Ellenwood's suggestion the court, on December 12, 1889, made an order *nisi* directing "that the said action do stand revived in the name of the said L. W. Ellenwood as such administrator, and proceed in his favor unless sufficient cause be shown against said revivor within the time allowed by law, to wit, on or before the 11th day of January, A. D. 1890, after the service of this order upon the said defendant" (p. 12). A correct copy of this order was made out by the clerk of the court, certified by him, and delivered to the marshal for service upon the defendant (pp. 12, 13). Thereafter, on December 23, the marshal returned this copy, certifying that he had executed it on December 19 by delivering personally to the president and also to the secretary of the Marietta Chair Company each a certified copy of the writ (pp. 12, 13). Thereupon, on January 22, 1890, defendant not having appeared or shown cause, the action was revived unconditionally in the name of Ellenwood as administrator (p. 13).

As a matter of fact the marshal's return was incorrect and he had made a clerical error in copying the writ, which error gave rise to the subsequent proceedings in the case. The marshal had made the not uncommon mistake of writing "June" for "January" in the copies served (p. 15). Before June 11 defendant and its attorneys discovered the mistake and learned that the return day of the original writ was January 11 (p. 16). They prepared a so-called "answer" in May, 1890, and made an application in open court to vacate and set aside the order of January 22, 1890. It does not appear by the record when Ellenwood and his counsel first had notice of this application. The application was heard

at the December term, 1890 (p. 17), and was decided on February 9, 1891 (p. 15). The court recited in its order the mistake aforesaid by which the return day was made June 11 instead of January 11 in the copies served on defendant; recited further that the defendant had no knowledge of the error until shortly before June 11, relying on the certified copy served; that the order of January 22 was "inadvertently and unguardedly made and entered," and further recited that the "answer" of defendant, submitted with its application in open court, shows to the court "good cause why said conditional order should not be made absolute and why said action should not be revived." The court therefore vacated the order of January 22, making the conditional order absolute, and gave defendant leave to file its answer to the rule to show cause and certain exhibits, affidavits, and evidence presented in support thereof. (pp. 15, 16).

The record states that "thereupon this cause came on to be heard upon the said answer of the defendant to said rule to show cause and the exhibits and evidence in support of said answer, and the same was argued by counsel and submitted to the court" (p. 16). It will be noticed that the phrase "this cause came on to be heard" does not refer to a trial of the issues raised by the pleadings, but to the argument of the motion.

This "answer" set up three objections to the revivor: First, that Ellenwood, like defendant, was a citizen of Ohio; second, that the statute of limitations had run against the cause of action prior to the substitution of Ellenwood as plaintiff; third (and this seems to have been the turning point), that Walton's appointment as administrator of Latimer Bailey by the probate court of Washington county,

Ohio, "was without jurisdiction or authority on the part of said court to make such appointment, and was irregular, illegal, invalid, and wholly null and void," Bailey having been a citizen of New York and leaving no estate to be administered in the State of Ohio, and Walton being neither husband, widow, next of kin, nor creditor (p. 14).

In support of the third objection, the proceedings of the probate court were filed and are as follows: Walton's *application* for letters states that Bailey, a resident of New York city, died May 4, 1885, intestate; that "this appointment is made to prosecute a suit or suits in this county," but "that there is no personal property in this county of said decedent and no real estate" (p. 19). Upon this application the probate judge entered the following order: "It appearing that the said Latimer Bailey died intestate, and that it is expedient that an administrator be appointed upon said estate, it is therefore by the court ordered that the said W. N. Walton be, and is hereby, appointed administrator of the estate of Latimer Bailey, deceased; and it is further ordered that the said W. N. Walton enter into a bond in the sum of $100, with approved sureties, according to law" (p. 20). Walton presented therewith an administrator's bond with only one surety (pp. 20, 21). The court had ordered that there must be at least two sureties upon every bond, but nevertheless it approved this bond with only one surety and ordered it recorded, and thereupon "ordered that letters of administration issue to the said W. N. Walton as such administrator" (p. 22). The letters were thereupon issued in due form on January 27, 1887. They recite that Bailey was "late of said county of Washington and State of Ohio" (pp. 22, 23). Defendant's president appended an affidavit stating the citizen-

ship of Ellenwood and Bailey and the fact that W. N. Walton was not the husband or widow, etc. (p. 23), "and this was all the exhibits and evidence offered by either party in the cause" (p. 18). Upon this documentary evidence the court entered the following order or judgment:

> That said answer and the exhibits and evidence in support thereof show to the court good and sufficient cause why the said conditional order should not be made absolute, and also why the said conditional order should be wholly vacated and set aside and the rule thereof discharged, and also why the said action should not be revived, and that this action has abated. It is therefore ordered by the court that the said conditional order of revivor be, and the same is, wholly vacated and set aside and the rule thereof discharged: that the said motion or application for said revivor of this action be, and the same is hereby, overruled and denied; that the said order of revivor applied for be, and the same is hereby, refused, and that this action be, and it hereby is, stricken from the docket of the court (p. 16).

Ellenwood excepted, and on May 27, during the same term of court, filed a bill of exceptions (pp. 16–19), apparently an unnecessary proceeding, as all the matters therein contained were filed and therefore part of the record (p. 16).

ASSIGNMENT OF ERRORS.

The following errors are assigned:

1. The finding and judgment of the court that the "answer" to the rule to show cause and the exhibits and evidence in support thereof show good and sufficient cause why the conditional order should not be made absolute; and, further, that they show good and sufficient cause why the conditional order should be vacated and set aside and the rule

discharged; and, further, that they show good and sufficient cause why the action should not be revived; and the finding and judgment of the court that the action had abated.

2. The judgment of the court vacating and setting aside the conditional order of revivor.

3. The denial and overruling of Ellenwood's motion on application for a revivor.

4. The court's refusal of an order of revivor and its striking the action from the docket of the court (pp. 25, 26).

ARGUMENT.

I.

The circuit court had jurisdiction of the action, and its order or judgment of February 9, 1891, is a final judgment, from which a writ of error lies.

Walton's citizenship gave jurisdiction to the court. He was a citizen of New Jersey and sued in Ohio, in the State and district of which defendant was a citizen. His citizenship is alleged in the original petition in a manner ruled sufficient by *Jones vs. Andrews*, 10 Wall., 327, and the original petition is part of the record of the cause and can be examined for the purpose of showing the citizenship of the parties at the commencement of the action (*Mexican Central Railway vs. Pinkney*, 149 U. S., 194, 200). The citizenship of both parties is also recited in the summons, which is contemporaneous with the commencement of the action. It is sufficient if the averments appear anywhere in the record

(*Briges vs. Sperry*, 95 U. S., 401; *Bondurant vs. Watson*, 103 U. S., 281; *Gordon vs. Third National Bank*, 144 U. S., 97). It is therefore immaterial that the amended petition fails to state the citizenship of the parties at the commencement of the action.

Ellenwood's citizenship is immaterial, the action having been properly commenced. (*Clarke vs. Mathewson*, 12 Pet., 164; *Hardenbergh vs. Ray*, 151 U. S., 112, 118.)

The *order or judgment* is a judgment in substance, as would be indicated by its use of the word "adjudges." It puts as final an end to the action as if it were a judgment upon the issues raised by the pleadings, and by force of the statute of limitations it puts as final a quietus on the claims of the estate of Latimer Bailey as if it were a judgment upon the merits of the cause. Therefore, although not a judgment upon the merits, it is a final judgment in the sense that it is reviewable by this Court. This case seems to be the converse of *Terry vs. Sharon*, 131 U. S., 40, where an order of revivor was held appealable.

In *Fuller vs. Claflin*, 93 U. S., 14, a writ of error was taken from the judgment entered upon an order striking out an answer. The answer was not struck out for any reason relating to the merits of the cause, but because it failed to comply with an order of the court directing that it be made specific and particularized. Defendants had asked for the delay of a day in order to perfect their answer, which request was refused. It was argued here that the orders were discretionary and not appealable. The Court held the order and judgment reviewable and reversed them, Mr. Justice Hunt saying (p. 16):

> The rule we are speaking of has sometimes been held to apply to an order refusing to strike out an answer (4 How. Pr., 432); but it does not apply to an order which strikes out an answer. That is not a mere procedure in the cause; it is the ending of the cause, leaving the action undefended and with a right to immediate judgment.

In *Commissioners vs. Lucas*, 93 U. S., 108, a writ of error was taken from an order of the supreme court of the State of Indiana reversing an order granting a temporary injunction and remanding the cause to the lower court with instructions to dismiss the complaint. Mr. Justice Field, in delivering the opinion of the Court, holding the order reviewable, made the following remarks (pp. 113, 114):

> It is objected, *in limine*, that this Court has no jurisdiction of the cause, on the alleged ground that the judgment rendered is not a final judgment. The order of the circuit court granting a preliminary injunction was, it is true, interlocutory, and if the judgment of the supreme court of the State had been limited to a simple reversal, the objection would have been tenable. The cause would then have remained in the circuit court for further proceedings. But the direction to that court, accompanying the reversal of its order to dismiss the complaint, made a final disposition of the cause. With the entry of that judgment the cause was at an end. With the peculiarities of the practice of the Indiana courts we have nothing to do. If upon an appeal from an interlocutory order a final disposition of the merits of a cause can be made in that State, it is no concern of ours. If by any direction the entire cause is, in fact, determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, subject in a proper case to our review, whatever may be its technical designation. The course adopted in this case was evidently pursued from the fact that the whole merits of the controversy had been considered on the motion for the preliminary

injunction. The application was founded upon the alleged invalidity of the act of 1872; no other matter was discussed, and all objections of form in the proceeding were waived, that the validity of the act might be considered and determined. Being determined against the view advanced by the plaintiffs, the cause, so far as the State courts were concerned, was practically at an end.

In *Memphis vs. Brown*, 94 U. S., 715, an order made in a *mandamus* proceeding, subjecting certain capital to a tax, was held reviewable on writ of error, although the *mandamus* proceeding had reached the stage of a peremptory writ over a year previously.

In *Sage vs. Railroad Co.*, 96 U. S., 712, an order confirming a sale was held appealable.

In *Ex parte Baltimore and Ohio R. R. Co.*, 108 U. S., 566, an order or judgment quashing a writ of replevin on the ground that the court was without jurisdiction, though made upon a simple motion before issue joined, was held reviewable.

In *Williams vs. Morgan*, 111 U. S., 684, 695, 699, an order fixing allowances of counsel in a foreclosure suit was held appealable. (See also *Trustees vs. Greenough*, 105 U. S., 527.)

In *Davies vs. Corbin*, 112 U. S., 36, an order awarding a peremptory writ of *mandamus* was held reviewable.

In *Gumbel vs. Pitkin*, 113 U. S., 545, a judgment dismissing an intervention petition in an attachment suit was held final. (See also *Withenbury vs. United States*, 5 Wall., 819; *New Orleans vs. Louisiana Construction Company*, 129 U. S., 45.)

In *Farmers' Loan and Trust Company, petitioner*, 129 U. S., 206, 213, and cases cited, it was held that orders subsequent

to the final decree in an equity suit are appealable "when they partake of the nature of final decisions" of the rights of the parties.

In *Stewart vs. Masterson*, 131 U. S., 151, 159, an order taking a bill in equity as confessed and directing that the cause be proceeded in *ex parte* was held appealable.

In *Ormsby vs. Webb*, 134 U. S., 47, 58, the Court held an order admitting a will to probate to be a final judgment, and Mr. Justice Harlan, at pages 60 and 61, said that the words "final judgment or decree" were as broad as the words "final judgment, order, or decree."

In the interesting case of *Potter vs. Beal*, 2 C. C. A., 60, Putnam, J., said:

> The record states that the order was preliminary, but, of course, this is not effectual, as it is for this court and not for the circuit court to determine that question in all cases, and the determination is to be governed by the essence of what is done and not by the appellation given to it.

In *Brush Electric Co. vs. Electric Imp. Co.*, 7 C. C. A., 208, an order dismissing a suit as to one plaintiff on the ground that it had been joined as plaintiff without its authority was held appealable.

If our position be correct that Walton's appointment was not a nullity, and that the estate of Latimer Bailey had a cause of action against the defendant which was not barred at the commencement of this suit, although it would be barred but for this suit at the time of the appointment of Ellenwood, then it is difficult to imagine a decision more final than the one this Court is now asked to review.

It may be argued that the revivor of the action was en-

tirely within the discretion of the court on account of the use of the word "may" in Ohio Rev. St., §§ 5148, 5149, 5150. But an estate certainly cannot in the discretion of the court be deprived of its cause of action because defendant's administrator happens to die, be incompetent, or even be a scoundrel.

That the Ohio statutes contemplate no such injustice is evident from the language of Rev. St., § 5158, which reads as follows:

> An order to revive an action in the name of the representative or successor of a plaintiff may be made forthwith, but shall not be made *of right* without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but when the defendant is dead or his powers have ceased, the order of revivor on both sides may be made in the period limited in the last section.

In *Carter vs. Jennings*, 24 Ohio St., 182, 188, it was held that to revive an action was a matter of right.

Were the Ohio law otherwise, yet it is submitted that the Federal courts would protect the rights of estates in such cases as this by ruling a revivor to be a matter of right. They are not obliged to adopt State practice if they disapprove of it. (*Mexican Central R'y vs. Pinkney*, 149 U. S., 194, 207.)

II.

The probate proceedings were irregular, but not void.

The Ohio Revised Statutes, § 5994, provides that—

> When any person shall die intestate in any other State or country, leaving any estate to be administered

> within this State, administration thereof shall be granted by the probate court of any county in which there is any estate to be administered.

It is not necessary to discuss whether a cause of action in tort is an "estate to be administered" within the meaning of this section; for a court of probate in Ohio has inherent power to grant administration when necessary without specific statutory authority. Its jurisdiction is general and unqualified "to grant and revoke letters testamentary and of administration" (§ 524). The probate courts of this country inherit the inherent powers of the English courts of like jurisdiction. (*McArthur vs. Scott*, 113 U. S., 340, 399.)

Actions for injuries to personal property survive in Ohio. (Ohio Rev. St., § 4975.)

The probate court in Ohio is a court of record (1 Ohio Rev. St., §§ 523 *et seq.* and 537), and its decrees are entitled to the same respect as decrees of other courts of record. In other words, they cannot be attacked collaterally unless void on their face. (*Shroyer vs. Richmond*, 16 Oh. St., 455, 466; *Arrowsmith vs. Harmoning*, 42 Oh. St, 254, 262; *Railroad Co. vs. Village of Belle Centre*, 48 Oh. St., 273, 291.)

Indeed, it is the general rule that letters of administration issued by an established probate court cannot be attacked in a collateral action (1 Woerner Am. Law of Adm., 329; *Johnson vs. Beazley*, 65 Mo., 250, 256, 264; *Wight vs. Wallbaum*, 39 Ill., 554, 563; *Dodge vs. Cole*, 97 Ill., 338, 351; *Morgan vs. Locke*, 28 La. Ann., 806, 807), provided the man whose estate is being administered is really dead. (*Scott vs. McNeal*, 154 U. S., 34, and cases cited.)

In *Mutual Benefit Life Ins. Co. vs. Tisdale*, 91 U. S., 238,

243, Mr. Justice Hunt said, speaking of letters of administration:

> In an action brought by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased.

In *Tant vs. Wigfall*, 65 Ga., 412, it was held that letters could not be avoided collaterally by proof that the decedent resided in another county, especially when the judgment granting the letters recited that deceased was "late of" the county in which they were issued.

In *Fisher vs. Bassett*, 9 Leigh (Va.), 119, 131, 138, a county court granted letters on the estate of a foreigner who died abroad and had no residence and no estate of any kind in the county. They were held voidable only. To the same effect is *Rogers vs. Duval*, 23 Ark., 77, 80.

The same rule applies to other decrees of probate courts (*Comstock vs. Crawford*, 3 Wall., 396; *Simmons vs. Saul*, 138 U. S., 439; *Farrar vs. Olmstead*, 24 Vt., 123, 126), as also to analogous proceedings *in rem*, such as attachments (*Cooper vs. Reynolds*, 10 Wall., 308); so judgments of Federal courts, though the record show lack of jurisdiction, are valid as against collateral attack. (*Dowell vs. Applegate*, 152 U. S., 327.)

The proceedings, so far as the record preserves them, were defective as well as irregular. Were the defects jurisdictional? We respectfully submit that they were not, and that in support of the presumption of validity of the action of the court it is to be presumed that whatever else may

have been necessary to show was shown, though it failed to be recited in the record.

The application fails to state that there is no husband, widow, next of kin, or creditor who does not renounce administration; neither does the record show whether or not there was any such person. It would have been error for the court to grant administration without such a renunciation, at least without waiting a reasonable time for such person to appear. It was not required, however, that the application of Mr. Walton should set forth the facts in this regard (Ohio Rev. St., § 6005). Nearly two years had elapsed since the death of Mr. Bailey—a circumstance proper for the probate judge to consider. (*Todhunter vs. Stewart*, 39 Oh. St., 181.)

The application stated that the appointment was sought "to prosecute a suit or suits in this county." This sufficiently for jurisdictional purposes averred the facts giving the court power to act. There is, indeed, the subsequent statement that "there is no personal property in this county of said decedent and no real estate," a statement correct on general principles, as the *situs* of Bailey's cause of action had been in New York and not in Ohio (*Kirtland vs. Hotchkiss*, 100 U. S., 491, 498), although there is customarily a a different use of language when speaking of probate matters. On reading the whole application together, there is no doubt as to its meaning. Moreover, defects in the application may have been cured by proof. That there was actually property in the county appears from the petition in this action, which must be regarded as admitted for the purposes of the present motion. If the court had jurisdiction and acted, that is surely enough.

The bond should have had two sureties (Ohio Rev. St., § 6006); but failure in this regard was a mere irregularity (*Slagle vs. Entrekin*, 44 Oh. St., 637, 640; 1 Woerner's Am. Law of Adm., 546), and was cured, so far as any collateral attack is concerned, by the order approving the bond and ordering it to be recorded, and by the letters of administration subsequently issued.

III.

It was not proper for the court to consider the merits of the case on such a motion.

It is respectfully submitted that this was error. If the validity of Walton's letters was one of the issues raised by the pleadings, it should have been left to be considered upon the trial of the action, unless the parties should waive by stipulation their right to jury trial. (Rev. St., §§ 648, 649.)

The court on this motion substantially tried one issue on the facts without a jury and decided it in defendant's favor, holding that the evidence would not be on the trial enough to go to a jury on. But the parties to an action at law are entitled to have the issues tried by a jury as a constitutional right, and it follows that they cannot be disposed of upon a motion (*Wayland vs. Tysen*, 45 N. Y., 281), except that if a party in default is forced to apply to the favor of the court, the court can look into the merits of his case in determining whether to exercise its discretionary powers.

We have so far assumed that the alleged defects, if debatable in this collateral proceeding at all, are put in issue by a general denial. This, however, may be seriously questioned. By the common-law practice a special plea was

necessary (*Noonan vs. Bradley*, 9 Wall., 394; *Newman vs. Jenkins*, 10 Pick., 515). It is a general rule under the code system that facts constituting a defense of illegality must be pleaded specially to enable defendant to prove them, although if plaintiff's own evidence shows that his claim is unlawful a verdict thereon may be directed for defendant irrespective of the allegations of the answer (*Milbank vs. Jones*, 127 N. Y., 370). Here defendant made no special plea. Hence this question arises: Would it have been sufficient on the trial for plaintiff to prove merely the letters of administration, which are regular on their face, or would he have had to put the whole probate record in evidence also? It seems to be well settled that letters of administration speak for themselves, and that no further evidence is necessary (1 Greenleaf on Evidence, 519; *Kane vs. Paul*, 14 Pet., 33, 42; *New England Mut. Life Ins. Co. vs. Woodworth*, 111 U. S., 138, 143; *Remick vs. Butterfield*, 31 N. H., 70, 84; *Belden vs. Meeker*, 47 N. Y., 307, and authorities cited), and by paying the *de facto* administrator the debtor is entirely protected. (*Kane vs. Paul*, at page 41.)

Hence defendant was not in a position, even at the trial, to raise these technical objections. In fact, he had entirely waived them.

The Ohio statutes contain a copy of the provisions of the New York code requiring the defense that plaintiff has no legal capacity to sue to be taken by demurrer or answer, and declaring it waived if not so taken (Ohio Rev. Stat., §§ 5062, 5064; N. Y. Code of Civil Procedure, §§ 488, 498, 499). The case of *Secor vs. Pendleton*, 47 Hun. (N. Y.), 281, is therefore in point, holding that the defense of insufficiency in averment of plaintiff's letters of administration,

if it appear upon the face of the complaint, is one that must be taken by the demurrer for incapacity. It would follow here that, as no defense attacking the letters of administration was specially pleaded, any defect in the probate proceedings was waived.

IV.

No other question arose upon this motion.

There is no evidence tending to impugn Walton's removal or Ellenwood's appointment, or to show that the estate's cause of action was deficient in any respect. If Walton's appointment was safe from collateral attack, the defense of the statute of limitations as set up in the second "answer" needs no consideration.

It is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
George L. Sterling
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

W. N. WALTON, ADMINISTRATOR OF THE ESTATE OF LATIMER BAILEY, DECEASED, PLAINTIFF IN ERROR,

VS.

THE MARIETTA CHAIR COMPANY, DEFENDANT IN ERROR.

No. 14,750.
No. 234, of October term 1894.

In Error to the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

BRIEF FOR DEFENDANT IN ERROR.

HARRISON, OLDS & HENDERSON and A. D. FOLLETT,
Attorneys.

BRIEF FOR DEFENDANT IN ERROR.

I.

The transcript of the record (as printed) fails to show that either (*a*) the *writ of error*, or (*b*) the *authenticated transcript* of the record, or (*c*) the *citation*, were *returned* and filed in this Court within the *thirty* days from the date of the writ, as required.

1. The writ of error, which appears at pp. 26 and 27 of the printed record, bears date of June 20, 1891. It is, perhaps, to be presumed that it was *issued* on that day, the presence of this writ in the Printed Record being perhaps sufficient ground for the presumption that the writ was *issued*. Its presence, there, may also, be sufficient ground to presume that the writ was *returned* to this court; and the same may be said of the presence there of an *authenticated transcript* of the record and the *citation*.

Sec. 997, Rev. Stats. requires to be annexed to and *returned with* the writ of error, an authenticated transcript of the record, an assignment of errors, a prayer for reversal, and a citation; and Sub. 5 of Rule 8 requires the writ to be returned here not exceeding 30 days from the date of the citation, such date being in the case at bar *June* 20, 1891. The writ, the authenticated transcript, the prayer for reversal and the citation were, therefore, to be each and all returned here not exceeding 30 days from June 20, 1891

But the printed transcript of the record does not show *when*, if at all, these or any of them were *returned* or filed here. The sole showing in this regard by the printed transcript being the presumption arising from their presence in the printed transcript, that they were returned and filed here at *some* time.

In order to discover *when* they were returned and filed here, this court must (*a*) either *presume* from their presence in the printed record that they were returned and filed *within* the required 30 days, or (*b*) must look at the originals, if such be found on the files of this court, and, if they bear file mark showing when *returned and filed*, be governed by such marks, or if they bear no such marks, take evidence *aliunde*, and from that ascertain and determine, the time of their *return and filing* here. By Rule 10, a true copy of the record is required to be printed, and, if not printed, when the case is reached on the regular call of the docket, the case may be dismissed. This court cannot *presume* or look to the originals, to ascertain, or otherwise ascertain, that the writ of error &c. were regularly and

properly returned and filed here without assuming the printed record to be erroneous or incomplete.

Under the circumstances, the defendant in error here may, we submit, stand upon the record as printed.

II.

The transcript of the record fails to show *service* of the writ of error.

The transcript contains a copy of the writ of error, and its presence therein may be, as already said, a sufficient showing of the *issuing* of the writ. But there is no showing of service of the writ.

Service of the writ of error is made by lodging a copy of it with the clerk of the court to which the writ is directed. *Davidson vs. Lanier*, 4 Wall., 447. The transcript of the record is the *return* to the original writ of error. *Mussina vs. Cavazos*, 6 Wall., 355. Three things are needful to the perfecting of a writ of error, it must be (*a*) duly issued, (*b*) duly served and (*c*) properly returned. The *printed* transcript alone shows an apparent writ *issued*. The sufficiency of this writ is elsewhere examined. But neither the *printed* transcript nor the authenticated transcript shows this to have been *served*. The apparent writ of error shown by the printed transcript (Record, 26,) has no filemark to identify it as the *original* writ issued in this proceeding, but being found in the *printed* transcript, although without a file mark of any clerk, and *not* being a part of the *authenticated* transcript of the record, it may, perhaps, be presumed to be the original writ issued by the clerk of the Circuit Court and returned to this court. Not being, as it is not, a part of the authenticated transcript of the record sent up here by the clerk of the Circuit Court, it is clear that it is *not* a transcript of the copy required to be lodged with him to make service of the original writ. Such copy so lodged with the clerk of the Circuit Court is a part of the *record*, and should be included, if it were so lodged there, in the authenticated transcript. *Mussina vs Cavazos*, *supra*. The certificate to the authenticated transcript (Record 26) conclusively negatives the idea that such copy was so lodged in the clerk's office of the Circuit Court, for the clerk certifies that the authenticated transcript is a *true* and *complete* transcript of the proceedings in said cause as the same appear of record or *on file* in his office.

In the face of this certificate, and in view of the fact that the original writ was issued by the *same* clerk who made the return thereto, there can be no *presumption* of the required service of the writ, if it were a matter that could rest in presumption: it is, however, a matter of *proof*, not of presumption.

The fact that the Clerk of the Circuit Court sent to this court an authenticated transcript of the record, does not waive or dispense

with the required *service* of the writ, especially against the defendant in error, who, although the clerk of the Circuit Court might be estopped from questioning the due and proper service of the writ, can insist that each required step in these adversary proceedings in error shall be taken, before he is compelled to answer to them.

In *Mussina vs. Cavazos, supra*, a copy of the writ was a part of the transcript of the record, but the original writ was not returned to this court because it had been destroyed. It was held, that in such case it may be considered as established that a writ of error was issued and served. But where, as in the case at bar, a writ of error was *issued* by the clerk of the Circuit Court, and this was by him returned here with a transcript of the record and such transcript shows *no* copy of the writ lodged with the clerk, it may *not* be considered as established that the writ was *served*.

The service of a writ of error by requiring it to be lodged with the clerk of the court where the judgment was rendered is not simply that such clerk may then send here an authenticated transcript and the other papers required, but such service is required "for the adverse party". *Wood vs. Lide*, 4 Cranch, 180.

Proper and legal service of the writ of error is essential to give this court jurisdiction. *Villabolos vs. United States*, 6 How., 90. It was there said by CHIEF JUSTICE TANEY: "Now the writ of error is always returnable to the term of the appellate court next following the date of the writ; and the citation required by the act of 1789 (which is a summons to the opposite party to appear) must be returnable to the same term, and unless the *writ* and citation are *both served* before the term, *the case is not removed to the appellate court*, and the writ if returned afterwards, will be quashed. *Lloyd vs. Alexander*, 1 Cranch, 365; *Bailiff vs. Tipping*, 2 Cranch, 406; *Wood vs. Lide*, 4 Cranch, 180; *Pickett's Heirs vs. Ledgerwood*, 7 Pet. 144; and *Yeaton vs. Lenox, and others*, 8 Pet. 123."

There has not yet been an appearance in this case by the defendant in error, except the limited appearance for the purpose only of this motion to dismiss the writ of error. But if there had been a mere appearance of the defendant in error, this would not amount to a waiver of service of the writ of error. The failure to have proper service of the writ of error made is the failure of the plaintiff in error *to duly prosecute his suit*. And the same reasons obtain for a dismissal upon this ground as upon a failure to file the transcript and docket the cause here during the term to which it was made returnable. *Grigsby v. Purcell*, 96 U. S. 505.

III.

1. So much of the writ of error as embraces the defects covered by the grounds of the motion to dismiss it, is as follows, namely:

"BECAUSE in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between *W. N. Walton, Admr. of the estate of Latimer Bailey, dec'd*, and the Marietta Chair Company, a manifest error hath happened to the great damage of the said *W. N. Walton, Admr. as aforesaid* as by *his* complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you" &c.

The defects consist in putting in the writ the name of "*W. N. Walton, Admr. of the estate of Latimer Bailey, dec'd*", where the same twice appears therein, and in *not* setting forth therein the name of "*L. W. Ellenwood as Administrator of the estate of Latimer Bailey, deceased*", the latter being the only party to the action against whom the orders or judgments complained of were made or rendered, and the former, although the original plaintiff in the action, having ceased to be such or to be a party to the action by virtue of his *removal* from the office of administrator of the estate of Bailey.

The writ of error was issued by the clerk of the *Circuit* Court. His sole authority to do this was Sec. 1004, Rev. Stats.; for, prior to the adoption of the statutory provision embodied in that section, a clerk of the Circuit Court could not issue such writ. *West v. Barnes*, 2 Dall., 401; *Mussina v. Cavazos*, 6 Wall. 355.

By express provision of that statute, writs of error, when so issued, "shall be, as nearly as each case may admit, agreeable to the form of a writ of error transmitted to the clerks of the several Circuit Courts by the clerk of the Supreme Court, in pursuance of Sec. 9 of the Act of May 8, 1792, chap. 36."

The form of writ of error thus prescribed, or so much of it as is pertinent to the questions now presented, is as follows, viz.:

"Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, between .....and.....,
a manifest error hath happened to the great damage of the said .....as by.....complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you", &c.

The case at bar presented no difficulties or reasons why the prescribed form of writ could not have been fully complied with. A comparison of the writ in the case at bar with the prescribed form of writ shows that the name of *Walton* as Administrator of the estate of Bailey was inserted in the writ where *Ellenwood's* name as such administrator should have been set forth, and could as easily have been set forth as *Walton's*.

When a writ of error is issued, the first and second blanks in the prescribed form of writ are to be filled by there inserting the names of the adversary parties to the action between whom the judgment was rendered, giving to each party his appropriate designation as plaintiff or defendant according to the facts in the court below; the third blank is to be filled with the name of the party suing out the writ of error; and the fourth is to be filed in accordance with the proper filling up of the third blank.

This was the manifest purpose of this part of the writ; and it was so prescribed in order that these adversary parties might be thereby pointed out and carefully separated from all other parties to the action in the court below, if any, and that they might also be properly designated in this court and that the action might be correctly entitled here.

Correctness in this respect was, prior to the adoption of Sec. 1005, Rev. Stats., so important a matter that it was *held:*

"Where the party who was really the *plaintiff in error*, and sought to reverse the judgment, was made the *defendant* and the *party in whose favor the judgment in the court below was rendered* was made *plaintiff in error* in the writ, it cannot be amended in this court, but *must be dismissed.*"

Hodge v. Williams, 22 How., 87;

Hines v. Papin, Dec. Term, 1857.

In *Hodge v. Williams, supra*, Mr. Chief Justice TANEY, delivering the opinion of the court, said:

"The writ of error removing the case to this court is in the name of the defendants who succeeded in the court below, and do not desire to disturb the judgment; and the plaintiff in that court, who alleges error in the judgment, and seeks to reverse it, is made the defendant in the writ of error."

"It is evident that the writ was intended to be sued out by the plaintiff in the court below, and that the names of the defendants, as plaintiffs in the writ, were used without their authority; for the errors are assigned by the plaintiff, and the bond states that a writ of error has been sued out by him, and the citation issued by the judge is directed to the defendants, and served on their counsel. And it is obvious that the writ in the name of the defendants was an oversight by the clerk by whom it was issued."

"But the amendment proposed cannot be made here. An amendment presupposes jurisdiction of the case. And this court have no appellate power over the judgment is brought here according to the act of Congress—that is, by writ of error; and that writ, from its nature and character, must be sued out by the party who alleges error in the judgment of the inferior court. This writ is not

mere matter of form, but matter of substance, prescribed by law, and essential to the jurisdiction of this court. And if it were amended here, by making the plaintiffs in error defendants, and the defendant in error the plaintiff, it would be a new writ made here, and not the one issued by the officer appointed by law."

And although it was obvious that the defect in the writ in that case was an *oversight* of the clerk by whom the writ was issued, it was further said: "It is the duty of the party who desires to bring a case before this court, to see that proper and legal process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere clerical error, for which he is not to be held responsible."

It has, however, also been held, where this requirement was substantially complied with, as by describing the parties in the writ *as they must appear and be styled in this Court*, that that is sufficient.

Mussina v. Cavazos, 6 Wall., 355.

In the case last cited, Mr. Justice MILLER, delivering the opinion of the court, said:

"But it is said that, conceding the copy of the writ of error in the record to be a true copy, and to be rightfully substituted for the original, it is fatally defective, because it does not correctly describe the parties to the suit. They are described as 'Simon Mussina, plaintiff in error, an Maria Josefa Cavazos and Estefana Goseascochea de Cortina, defendants in error. The parties are correctly described in the writ as they must appear and be styled in this court, but we are not told, by the writ, who was plaintiff and who was defendant below. The full names of all the parties to the judgment below are given, and their relations to the suit as it stands in this court are given. We are also told, that the error (if any) committed by the district court, was to the manifest injury of Simon Mussina, plaintiff in error. Is the writ then void because it does not say which of these parties was plaintiff in that court and which defendant?

"We think that the description, although not in the usual or even the most appropriate form, is sufficient. If there is any doubt about the relations of the parties to the suit below, it can be solved by the record. Having that before us, we see that Mussina was defendant below, and is properly described as plaintiff in error in the new proceedings instituted by the writ, and that the others were plaintiffs below, and are also properly described as to their relations to the new proceeding which that writ commences."

"But many cases have been dismissed by this court, because the writ of error described either plaintiff or defendant as 'A B, and others', or 'A. B. & Co.,' or other partnership style, or as 'Heirs of C. D.,' and such other descriptions as did not give the names of all

the persons who were supposed to be brought before the court by the writ. Of late years these cases have simply been dismissed upon the authority of previously adjudged cases, without giving other reasons for so doing."

"It is claimed that the case before us falls within this class, in the matter we are now considering. To determine if this be so, we must go back to the earlier of these cases to discover the principle on which they were decided."

After examining briefly the cases decided by this court, he further said:

"In all of them it appeared by the writ that there were parties to the judgment below, not personally named in the writ. But an examination of this writ of error raises no such presumption. Nor can the court be at any loss from this writ, to properly name the party or parties for and against whom it will render its judgment, when it has decided the merits of the controversy."

"The present case, therefore, does not fall within the principle of any of the numerous cases cited by counsel, or of others examined by the court."

It has also been held, that the writ of error is the writ of this Court, and not of the Circuit Court whose clerk may actually issue it, (*Mussina vs. Cavazos, supra*); and that a clerk of the Circuit Court has no right to *change* its form without the consent of the justices of this Court. (*Barton vs. Forsyth.*, 5 Wall., 590.)

It thus appears that, at least, until the passage of the Act of June 1, 1872, (C. 255, s. 3, vol. 17, p. 196,) which is now embodied in Sec. 1005, Rev. Stats., the law was settled that a writ of error was *not* to be carelessly or informally drawn, and that, in the language of *Hodge vs. Williams, supra*, the law imposed a duty upon "the party who desires to bring a case before this court" "to see that *proper* and *legal* process is sued out for that purpose; and if he fails to do so, he has no right to treat the defect as a mere *clerical* error for which he is not to be held responsible." And so, prior to the adoption of what is now Sec. 1005, Rev. Stats., such a defect as that now under consideration was fatal to a writ of error, and the writ could not be amended but had to be dismissed.

Insurance Co. vs. Mordecai, 21 How., 195;
Porter vs. Foley, 21 How., 393;
Hodge vs. Williams, 22 How., 87;
Mussina vs. Cavazos, 6 Wall., 355;
Washington vs. Dennison, 6 Wall., 495.

And the law in this respect was so settled notwithstandig the provisions of the 32d section of the Judiciary Act (now Sec. 954, Rev. Stats.) that "No summons, writ, declaration, return, process, judg-

ment or other proceeding in civil causes, in any court of the United States, shall be abated, arrested, quashed or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such condition as it shall, in its discretion and and by its rules, prescribe."

Such an error is still fatal, unless it be amendable under Sec. 1005, and unless an amendment be applied for by the party entitled to it and it be granted by this Court. This Court will not *sua sponte* order an amendment of the writ to be made.

The act of Congress referred to by Mr. Chief Justice TANEY in *Hodge vs. Williams, supra*, is what is now Sec. 691, Revised Statutes. That section provides that "all final judgments of any Circuit Court * * * may be re-examined and reversed or affirmed in the Supreme Court upon a *writ of error*." It was held in the cases above cited, and perhaps in others of like character, that pretended writs of error containing such defects as exist in the writ of error in the case at bar, was *not* a writ of error within the meaning and effect of said act of Congress. And so, this Court having jurisdiction to re-examine and reverse or affirm judgments of the Circuit Court only upon a "writ of error", and such pretended writs not being *writs of error*, this court held it had no *jurisdiction* in such cases. Such defects were then and are still matters *of substance*, and not mere matters *of form*. (*Hodge v. Williams, supra.*)

Assuming then that an amendment will be applied for, (although such application has not yet been made,) to correct the defect now under consideration, we proceed to inquire whether the writ of error may be amended in this regard, and, if so, whether this Court ought, in the exercise of its discretion, to grant such amendment. So much of Sec. 1005, Rev. Stats., as applies to the case at bar is as follows:

"Sec. 1005. The Supreme Court may at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, * * * when the *statement of the title of the action or the parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form*: Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error."

"The right of a party to amend is not *absolute*, but it is to be

granted by the Court in its *discretion*. Whether it shall be granted in a particular case must depend upon the attending circumstances."

Pearson v. Yewdall, 95 U. S., 294.

The *power* of this Court to allow amendments of such defects in pretended writs of error, which power is derived solely, if it exists at all, from Sec. 1005, Rev. Stats., and which, if it so exists and is exercised with respect to any such defect in a given case, converts what was *not* a "writ of error" before the passage of that statute, into what must now be regarded as such writ of error,—is a *limited* power; it is limited by that section itself to the classes of cases therein specified.

Its operation cannot and will not be extended, in view of the prior settled law, to cases not within the terms of the section, or beyond the reasonable intendment of the statute when applied to cases *within* the statute.

Moreover, the discretion of the Court can only be exercised within the limits of the power; and if a case falls outside of the power, there can be no exercise in such case of any discretion by the Court.

The defects in the present writ of error must each come within the meaning and operation of the 4th clause or 5th clause of that section or they are not embraced in the section. The defects we are now considering, however, namely, the putting of the name of *Walton as the Administrator of Bailey*, and the not putting of the name of *Ellenwood as such Administrator* in the *first* blank of the prescribed form of writ, seems to be a defect in "the statement of the title of the action or the parties thereto in the writ."

The case of *Pearson v. Yewdall*, *supra*, is authority to the effect that the *omission* to state in the first or second blanks in the prescribed form of writ the name of the only party adverse to the plaintiffs in error in the writ, and the stating therein of the names of parties in the court below who were *not adverse* parties to the plaintiffs in error in the writ, instead of correctly giving therein the name of the *real adverse* party, is a defect *in the statement of the parties to the writ*, within the meaning of Sec. 1005, Rev. Stats., and is amendable under that section in the discretion of the court. But that case shows, however, that this court will not, in the exercise of a sound discretion, allow such amendments in all cases where it has the power to do so.

In *Pearson vs. Yewdall*, *supra*, which was in the court of original jurisdiction, an action for the appropriation by the City of Philadelphia to a public use of the private properties of a number of different property owners, the *plaintiffs in error* in the writ were property owners who complained of the allowances made to them by the viewers in the first instance and afterwards by the court in confirming the report of the viewers; and the *defendants in error* in

the writ were other property owners against whom also such appropriation proceedings were had and at whose instance the viewers had been appointed. The *City of Philadelphia* was *not* a party to the writ of error. In that case Mr. Chief Justice WAITE, delivering the opinion of the court, said:

"There can be no doubt but that the city is an indispensable party to this suit. The viewers were appointed at the instance of the defendants in error; but they were appointed in a proceeding by the city, in its nature adverse to all the property owners affected, for an appropriation of private property to public use. It nowhere appears that the interests of the plaintiffs in error are adverse to those of the defendants in error. They were both property owners, and both seeking compensation for their property before it should be opened to the use of the public. The city alone represented the public, and was, therefore, the only party to the proceeding adverse to the claimants. Under such circumstances, we cannot properly review the judgment below in its absence."

In that case, however, the defect in the writ of error was the failure to give the name of the *defendant in error*, in the statement of the parties to the writ; but in the case at bar it is the name of the *plaintiff in error* which is *not* given in such statement, and in place thereof is given the name of him who *by the record* has not been, but by the writ of error appears to be, the *plaintiff in error*. Such a defect may nevertheless be within the power granted by Sec. 1005; but, if it be "the duty", as it was held to be in *Pearson vs. Yewdall*, *supra*, "*of the party who desires to bring a case before this Court*, to see that *proper and legal* process is sued out for that purpose," he would be less likely to allow *his own name* to be omitted from the writ as the *plaintiff in error* therein than he would be to incorrectly state the name of the *adverse* party or parties to the writ. In the former case, which is the case at bar, he would be guilty of greater carelessness than in the latter case; and the case at bar is, therefore, one which, if within the *power* of this Court, appeals less strongly to its discretion, than do such cases as *Pearson vs. Yewdall*.

The case of the *Pacific Bank v. Mixter*, 114 U. S., 463, was a case where the defect was in the name of the *defendant in error*, plaintiff below. In *Gumble v. Pitkin*, 113 U. S., 545, the ground urged for dismissal was that "the writ of error does not set forth the names of the *members* of the several firms mentioned in the writ as defendants, and there is nothing in the record by which this irregularity may be corrected." This was also the case where the question arose over the designation of the *defendants in error* in the statement of the parties to the action in the writ: the name of the plaintiff in error was correctly stated in the writ. Mr. Justice MILLER, delivering the opinion of the court, said:

"The writ of error does not set forth the names of the members of the several firms mentioned in the writ as defendants, and there is nothing in the record by which this irregularity may be corrected."

He further said:

"This court has undoubtedly, from the case of *Deneale v. Stump*, 8 Pet. 526, to that of *The Protector*, 11 Wall., 82, held that all the parties to the judgment must be named in the writ of error, and that the use af the name of one of the parties, with the addition of the words 'and others', as 'Joseph W. Clark and others', does not satisfy the requirement, but on the contrary shows that there were parties to the judgment or decree in the inferior court who are not named in the writ. It is upon this ground that the judgment in the case of *Smith v. Clark and others*, 12 How., 21, is distinctly placed by CHIEF JUSTICE TANEY in the opinion.

"In the case of *The Protector*, *supra*, the appeal was taken in the name of William A. Freeborn & Co., while the record showed that William A. Freeborn, James F. Freeborn, and Henry P. Gardner were the libelants.

"In this court counsel insisted that the objection was not fatal, and that the appeal might be amended, but the court held otherwise and dismissed the appeal.

"In the present case the defendants are named in the writ in almost every instance by such designations as B. Dreyfus & Co, Corning & Co., John Osborn, Son & Co., and so on.

"We should have no hesitation now, under section 1005 of the Revision, which became a law by the act of June 1, 1872, after the case of *The Protector* was decided, to permit the plaintiff in error to amend if there was anything to amend by.

"But the transcript of the record before us shows that these parties came into the Circuit Court as defendants or intervenors, and prosecuted their rights throughout the whole proceedings by the designations applied to them in this writ of error and by no other names whatever.

"No amendment of the writ, to remove this difficulty can, therefore, be made from the record before us."

He also said:

"In this case the plaintiff in error gives his own full name and he is the only plaintiff. He describes in his writ of error all the parties opposed to him, by the names and designations which they gave themselves in their pleadings, motions and proceedings in the court below, and by which they are mentioned in the judgment which distributes to them the money that he asserts should rightfully go to him. We are not advised as in the *Freeborn Case*, by the record that the apellants had other names than Freeborn & Co., nor, as in

the Deneale Case, that there were *others* who were attempted to be made parties by that work, with no other designation.

"We think that, where the writ gives all the names of the parties as they are found in the record of the case in the Circuit Court, and where there is nothing to show that any other person was a party than such as are so named, this court is not at liberty to indulge the presumption that there were others who were parties, when such presumption is not founded on anything in the record and would lead to a manifest injustice."

2. If the defects in the statement of the parties to the action in the writ were otherwise amendable, they cannot be remedied by reference to the accompanying record. This condition found at the end of the fourth clause of Sec. 1005 is a limitation upon the *power* of the court, at least when exercised in reference to the cases falling within the fourth clause; and if, therefore, these defects cannot be so remedied, there is no case presented in respect to which the discretion of the court can be exercised. As already observed, the *discretion* of the court can only be exercised with respect to the cases falling within the *power* of the court. The court cannot remedy these defects by reference to the accompanying record because of the *contradictory* state of the record. There is no question but that the orders or judgments complained of were made or rendered against *Ellenwood as the alleged Administrator of the estate of Bailey.* If the record were in harmony with this in respect to the necessary steps to be taken to bring a case here for review or to enable this court to re-examine it, that would be a case analogous to cases which have been decided by this court, but the case at bar as shown by the record is a different sort of case.

Ellenwood in his *individual* capacity excepted to the orders or judgments now complained of, but he did not except to them in his alleged *representative* capacity.

While the entry allowing the bill of exceptions (Record 17) shows it to be taken by Ellenwood in his alleged representative capacity, the bill itself (Record, 19) shows it to be the bill of exceptions of Ellenwood in his *individual* capacity.

The assignment of errors, the prayer for a citation and reversal, (Record 25, 26) are each by Ellenwood in his individual capacity.

In the face of such a contradictory record, we submit that the court ought not to ignore it and presume all the necessary jurisdictional steps to have been *duly* taken by the *proper* party.

3. Closely connected with the first and second defects in the writ, and yet distinct from them, is the *third* defect in the writ, which is, that it is, or purports to be, the writ of error of "*W. N Walton, Admr. of the estate of Latimer Bailey, dec'd,*" and it is not, or

does not purport to be, the writ of error of *Ellenwood* as such administrator of Bailey, who is in fact the party seeking to bring this case before this Court. The prescribed form of the writ of error provided a place (which is the third blank in so much of the writ as has already been quoted and given) where shall be stated the *party who claims to have been damaged* by the judgment complained of and who seeks by the writ of error to bring the case before this Court

As illustrating the effect of this mistake this action here appears to be, and is so entitled, the action of *Walton as Admr. of Bailey* against the defendant in error, when in fact *Walton*, either individually or in any representative other capacity, is and has *not* been a *party* in this court.

BRIEF IN OPPOSITION TO MOTION TO AMEND.

Since the writing of the foregoing Mr. E. B. Whitney has filed a motion on behalf of one L. W. Ellenwood to amend the writ of error by striking out the words "W. N. Walton" and substituting the words "L. W. Ellenwood." We have heretofore given our views to some extent as to the right on the part of any one to amend the writ of error, and have but little more to say.

This motion to amend the writ of error is simply an attempt on the part of an entire stranger to the case in this Court to intrude himself into it, and he seeks to effect this intrusion by summarily ejecting from the case a party to the case, and the party so sought to be ejected is the sole plaintiff in error. The mere statement of what this motion seeks to accomplish seems to be a sufficient reason for its denial. W. N. Walton brings a proceeding in error in this Court, then L. W. Ellenwood asks to have W. N. Walton stricken from the record and himself substituted as the person who brought the case in this Court. It should be noted that this request of Ellenwood's is not based upon any succession of right by Ellenwood, or other change or circumstance, occuring since the proceedings in this Court were instituted, but because it is conceived that Ellenwood, and not Walton, *should have* instituted the proceedings in this Court. A motion to amend a writ of error can only be made by or on behalf of one who is already a party to the proceedings in error; a stranger to the record has no standing to make such a motion. Laying aside all considerations as to the rights of Walton, who brought these proceedings in error, and all questions as to whether he can be summarily ejected from a case he himself brought, and that without notice to him and by a stranger to the case in this Court, only a party to an action can move the Court to amend a writ or take other similar action, the sole right of a person not a party to the action is to ask the Court that he be made a party to it, and this he can do only in the Court of original jurisdiction and not in a Court of appellate jurisdiction; and when he is so made a party he comes into the case solely in virtue of his own right, and cannot, in order to get into the case, have a person who is already a party ejected so as to make room for him, and then take advantage of all that has been done by the party ejected; particularly where the action is a proceeding in error the stranger who is let into the case by this eviction process cannot claim the benefit

of the proceedings instituted by the party evicted. If Ellenwood be let into it at all it could only be that *he* may *now* institute proceedings in error—lapse of time however has barred him from this—and he cannot claim the benefit of the proceedings instituted by Walton. Whether or not Walton had the right to prosecute error to the judgment of the Court below *he* and *he alone* is entitled to the benefit of the proceedings which *he* prosecuted: Ellenwood cannot take the benefit of them because Walton *did* do what Ellenwood *should* have done. We submit that not a case can be found where this Court has allowed a motion to amend a writ of error unless the same was made by a person who was already a party to the case in this Court. This is not a motion by a party to the case to amend the writ of error so as to bring in a new party; the parties in the case are entirely satisfied; a stranger wishes to eject a sole Plaintiff in error from the proceedings in error which he has instituted, and carry them on himself. The cases cited by Mr. Whitney in his brief do not at all bear out his contention, and do not apply to his motion. Knickerbocker Life Insurance Company vs. Pendleton, and United States vs. Schoverling, are both cases where a Plaintiff in error, or an appellant, ask the Court to amend the writ of error, or appeal, so as to bring in persons as Defendants in error or appellees not previously brought in. In Estis vs. Trabue, although the amendment of the writ of error, (which was not in fact allowed, the Court saying however that it would have allowed it had not other considerations intervened), related to the Plaintiffs in error as well as to the Defendants in error, it consisted simply in setting out in full the individual names of the members of the firm, the firm being already a Plaintiff in error; the motion was made by a person who was already a party to the case. The amendment did not even bring in any person who was not already a party. In none of these instances was the motion to amend, as in the case at bar, an attempt to break into the case as sole Plaintiff in error by a stranger.

Again the amendment asks to insert "L. W. Ellenwood" as the Plaintiff in error. It is well settled that a person can prosecute a case only by his legal name, including his Christian name in full. This was settled in Ohio, whose Code of Procedure governed the Court below, in the early case of Herf & Co. vs. Shulze et al, 10th Ohio Reports, page 263. The same point was distinctly ruled in Barth vs. Makeever, 4th Bissell, p. 206. In *in re* Valentine, 4th Bissell, p. 317, the same rule was applied to proof of claim against a bankrupt. Mr. Whitney in his brief apparently concedes this, but cites Breedlove vs. Nicolet, 7th Pet., p. 413, as holding that "L." *may* be sufficient, as Ellenwood *may* have no Christian name. It is probably now well settled that nothing appearing to the contrary a letter,

even a consonant, will be *presumed* to be the Christian name of a man, all these cases however holding as clearly as the others that the *full* Christian name, whatever it may be, must always be given. But in the case at bar there is no room for the application of this doctrine or the doctrine urged by Mr. Whitney based on Breedlove vs. Nicolet. There is on file in this Court in this case an affidavit, which has not been and will not be contradicted by Mr. Ellenwood or any one else, that Ellenwood's Christian name is Lowell and that "L" is the initial only of his Christian name. That the filing of this affidavit is proper practice seems clear. How else can the fact be made to appear? The presumption is one of fact only and rebuttable.

In the foregoing original brief we called the Court's attention to the fact that even should the writ of error be amendable there is nothing in the accompanying record by which it can be amended.

We also call the Court's attention to the great laches that has intervened. The writ of error in this case was issued June 20, 1891, and the case is now about to come before the Court in its regular order on the calendar.

As to the merits of the alleged errors we have of course nothing to say at present.

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Attorneys for Defendant in error.

SUPREME COURT OF THE UNITED STATES

W. N. WALTON,

Administrator of the Estate of Latimer Bailey, Deceased,

PLAINTIFF IN ERROR,

VS.

THE MARIETTA CHAIR COMPANY,

DEFENDANT IN ERROR.

No. 14,750.

No. 234, of October Term, 1894.

In Error to the Circuit Court of the United States for the Southern District of Ohio, Eastern Division.

BRIEF ON THE MERITS

FOR THE DEFENDANT IN ERROR.

HARRISON, OLDS & HENDERSON and A. D. FOLLETT,

Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

Walton's alleged citizenship in *New Jersey* is claimed to be the foundation of the jurisdiction of the court below. His capacity to bring the suit as it was brought is founded upon his allegation that he was the duly appointed and qualified administrator of the estate of Bailey, by proper proceedings in the Probate Court of Washington County, Ohio (Record, 7, 8). Both the alleged citizenship of Walton and also his alleged representative capacity were each denied by the Answer (Record, 10).

The issues made by the pleadings have never been tried, and none of them were disposed of on or prior to December 12, 1889, when Ellenwood appeared in the court below and suggested the removal of Walton from the office of Administrator of the estate of Bailey, and the revocation of his letters of administration, and that he, Ellenwood, had been duly appointed and qualified as such Administrator. That court then, on the motion of Ellenwood, made what is styled in the Ohio Code of Procedure, "a conditional order of revivor," directing that the action stand revived in the name of Ellenwood as such Administrator, and proceed in his favor, unless sufficient cause should be shown against such revivor on or before the 11th day of *January*, A. D. 1890, *after service of such order upon the defendant* (Record, 12).

A certified copy of that order was issued to the Marshal for service upon the defendant, and his return states that on December 19, 1889, he served the defendant with a "certified copy" of such order (Record, 13). This return was incorrect and untrue, the truth being as the court below found, that a paper *purporting* to be a certified and true copy of said "conditional order of revivor" was served on the defendant, but that such pretended copy, instead of notifying and directing the defendant to answer the rule of such conditional order, and show cause to the court, on or before the 11th day of *January*, A. D. 1890, *in fact* notified and directed the defendant to so answer and show cause to the court on or before the 11th day of *June*, A. D. 1890. Without this error in the return of the Marshal, or the mistake in said pretended copy served on the defendant, or the discrepancy between such pretended copy and the order of the court as made and entered on its journal, having come to the knowledge of the court, the court, on the 22d day of January, A. D. 1890, inadvertently and unguardedly entered an order on its journal that the action stand revived in the name of Ellenwood, as Administrator of the estate of Bailey, and proceed in his name on such Administrator (Record, 15).

The defendant and its attorneys, relying upon such pretended copy so served upon the defendant as a *true* copy of the order of the court actually made and entered, did not discover until long after the 22d day of January, 1890, and shortly *before* the 11th day of *June*, 1890, that such conditional order as entered of record notified and directed the defendant to so answer and show cause to the court on or before the 11th day of *January*, A. D. 1890 (Record, 16).

The defendant thereupon appeared and in open court made his application to the court *prior to the 11th day of June, 1890* (Record, 15), to vacate and set aside said order of January 22d. 1890. The action of the court upon this application was not taken, however, until the 9th day of February, 1891, which was at the *first term* after that at which the said application was made. The court at the date last mentioned *found* (a) that the error existed as above stated in such pretended copy of said conditional order served on the defendant (b), that the defendunt and its attorneys relied entirely upon such pretended copy tcuching the time to so answer and show cause (c), that the order of January 22d, 1890, was inadvertently and unguardedly entered (d), that the answer to the rule to show cause showed good and sufficient cause why said conditional order should not be made absolute and why the action should not be revived, and (e) that the answer of the defendant to said rule to show cause was submitted to the court at the *same time* with the defendant's said application as aforesaid and *prior* to the 11th day of *June*, 1890 (Record, 16). The court thereupon made an order wholly vacating and setting aside said order of January 22d, 1890, and granted leave to the defendant to forthwith *file* its said answer and exhibits, affidavits and evidence in support thereof; and the same were filed accordingly. Whereupon the court proceeded to a hearing upon the said answer, exhibits and evidence in support thereof, no evidence whatever having been offered or adduced against said answer, and the said Ellenwood not having made *profert* of his letters of administration; upon consideration whereof the court *found* and *adjudged* that said answer, exhibits and evidence showed good and suffi-

cient cause (a) why said conditional order should not be made absolute (b), why such conditional order should be vacated (c), why the action should not be revived, and (d) that the action had abated (Record, 16).

The court thereupon ordered (a) that the said conditional order be and the same was wholly vacated and set aside, and the rule tnereof discharged (b), that the application for revivor of the action be and the same was overruled and denied (c), that the order of revivor applied for be and the same was refused, and (d) that the action be and the same was stricken from the docket (Record, 16). This is the order complained of in the writ of error herein.

The answer to the rule to show cause showed to the court (1) that Ellenwood was and always had been a citizen and resident of the State of Ohio, the same State of which the defendant was a citizen and resident; (2) that the action was barred by the statutes of limitation; (3) that Ellenwood was not the successor in office of Walton as Administrator of Bailey; and (4) that Walton never was the administrator of the estate of Bailey, because (a) any appointment of Walton as such administrator was wholly illegal and null and void, (b) Bailey died a resident and citizen of the State of New York, (c) Bailey did not leave any estate to be administered in the State of Ohio, or in said Washington county, (d) Walton was not the next of kin, nor a creditor of said Bailey (Record 14).

Exhibit "A," which was a Certified Transcript of Proceedings in the Probate Court of Washington county, Ohio, touching the appointment of said Walton, tended to show:

(1) that Bailey was a resident of the State of New York at the time of his death and died May 4, 1885; (2) that Bailey was a non-resident of Ohio; (3) that the said appointment of Walton was made to prosecute a suit or suits in said Washington county; (4) that there was at the time of such appointment no personal or real property of said Bailey in said county; (5) that said Probate Court found (a) that Bailey died intestate, and, (b) that it was "expedient that an administrator be appointed upon said estate;" (6) that that court then ordered that Walton be and he thereby was appointed administrator of the estate of Bailey, and that his bond be fixed at $100; (7) that thereupon said Walton filed in said court his bond of $100 with a single surety thereon; (8) that a standing order of said court was then unrevoked, to the effect that on all bonds taken in said court there shall not be less than two sureties, who must be residents of said county; (0) that the said court by specific order approved said bond of Walton, with a single surety thereon whose residence is not shown; and (10) that letters of administration were issued by said court to Walton as Adminstrator of the estate of Bailey (Record 19–22).

Exhibit "B," which was the affidavit of John Mills, the President of the defendant company, showed: (1) That the defendant is and always has been a citizen and resident of Ohio; (2) that Ellenwood is and always has been a citizen and resident of Ohio; (3) that Bailey died in New York May 4th, 1885, and was at that time a citizen and resident of that State; and (4) that Walton was not the next of kin, nor a creditor of Bailey (Record, 23).

ARGUMENT.

I

The alleged *cause of action* in the court below, being trespass *quare clausum fregit* and accruing wholly in the lifetime of Bailey, the plaintiff in error's intestate, *did not*, at his death, *survive by law*; and, therefore, the suit in the court below was brought and prosecuted (so far as it was prosecuted) by Walton, as the administrator of Bailey, without authority in law, and it could not be revived, and cannot be maintained, by Ellenwood, as administrator *de bonis non* of the estate of Bailey.

1. The cause of action alleged is trespass *quare clausum fregit.*

Cotton v. United States, 11 How., 229.
Tompkins v. Vintroux, 3 W. Va., 148.
Walker's American Law, (9th Ed.), 614.
Dougherty v. Stepp, 1 Dev. & B. (N. Car.) 371.
Sturgis v. Warren, 11 Vt., 433.
Haskin v. Record, 32 Vt., 575.
Harris v. Grenshaw, 3 Randolph, 14.

Trespass *quare clausum* lies for every unlawful intrusion, whether the land is inclosed or not, though only the grass is trodden.

Dougherty v. Stepp, 1 Dev. & B. (N. Car.) 371.

The entering upon real estate, and severing a part thereof and carrying it away, by one continuous act, can be recovered for, by the tenant, only by an action of trespass *quare clausum.*

Sturgis v. Warren, 11 Vt., 433.

The plaintiff, having the right to enter upon certain land belonging to another, upon which was standing both pine and cedar timber, which timber belonged to the plaintiff, sold to the defendant the pine timber and the right to enter upon the land to cut and carry it away, Both parties having entered upon the land to cut and carry away the timber belonging to them respectively, the defendant carried away some of the cedar felled by the plaintiff; *Held*, that the plaintiff could maintain trespass *quare clausum fregit* therefor.

Haskin v. Record, 32 Vt., 575.

Proof of cutting and removing wood is sufficient.

Maxwell v. Maxwell, 31 Me., 184.

An action for forcibly entering upon land owned and possessed by the plaintiff, and tearing down a dwelling house and out buildings and tearing away the material of which they were built, and for digging up and tearing away fruit trees, is *quare clausum fregit*.

Uttendorffer v. Saegers, 50 Cal. 496.

2. The record shows the alleged trespasses were committed between the 1st day of January, 1875, and the date of the death of Bailey, namely, *May 4, 1885*.

3. The *survivability* of the alleged cause of action wholly depends upon, and is governed by, the *local* law, that is, the law of West Virginia where the alleged cause of action arose, the laws of the United States prescribing *methods* only for reviving suits that do survive, but not prescribing what suits shall survive.

Hensaw v. Miller, 17 How. 212.
Witters v. Foster, 26 Fed. Rep., 737.
Warren v. Furstenheim, 35 Fed. Rep. 691.
Hatfield v. Bsuhnell, 1 Blatchf. 393.
Trigg v. Conway, Hempst. 711.
See *In Matter of Schreiber*, 110 U. S. 76.
U. S. v. Daniel, 6 How. 11.

4. By such *local* law, which is to be determined by or from the legislation and decisions of West Virginia in so far as the common law is changed thereby, the alleged cause or right of action did *not* survive.

Virginia Code of 1860, Sec. 20, Ch. 130, Tit. 38, and Secs. 1 and 2, Ch. 173, Tit.
Constitution of W. Va., Sec. 8, Art. XI.
West Virginia Code of 1868, Sec. 20, Ch. 85, and Secs. 1 and 2, Ch. 127.
Tompkins v. Vintrox, 3 W. Va., 148.
See *Gerling v. B. & O. R. R. Co.*, 151 U. S , 673.

In *Henshaw v. Miller*, *supra*, this court, for its guidance in determining whether an action (that is, a right of action) survived against the executor or administrator of an *original* defendant, or abated by the death of the latter, adopted the following principle, namely, "that this question is to be determined by the rule of the common law with respect to the revival of suits, except so far as that rule has been modified, either by restriction or enlargement, by the statutory provisions of the Virginia law."

The state of the law of Virginia prior to the Code of Virginia of 1849 appears from the case last cited.

By the 64th section of chapter 104, vol. 1, of the Revised Code of 1849, it was declared :

"That actions of trespass may be maintained by or against executors or administrators, for any goods taken or carried away in the lifetime of the testator or intestate, and that the damages recovered shall be in the one case for the benefit of the estate and in the other out of the assets."

This provision was the one especially involved in the case of *Henshaw v. Miller, supra.* That provision remained in force until the adoption of the Virginia Code of 1849, wherein there was substituted for it the following provision, namely :

"An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of or damages to, any estate of or by his decedent."

See 3 Robinson's Practice, 294.

This identical provision has from that time to this remained a part of the law of Virginia, it being re-enacted in the Code of 1860, as Sec. 20, of Chap. 130, Title 38 thereof—in the Code of 1873 as Sec. 20, of Chap. 126 of Title 38 thereof—and in the Code of 1887 as Sec. 2655 thereof. As a part of the law of Virginia, it became and remained, by virtue of Sec. 8, Art. XI of the Constitution of West Virginia, the law of the latter State until the first Code of West Virginia, that of 1868, was adopted. In this Code, this provision was re-enacted in the same language exactly as Sec. 20 of Chap. 85, thereof, and thereby remained in force until the Code of 1891 was adopted wherein it was again re-enacted as Sec. 20, of Chap. 85, thereof.

This provision has thus continuously remained unchanged as a part of the law of Virginia from 1849 to the present time, and of the law of West Virginia from the organization of that State down to the present time. It was consequently in force as part of the law of the latter State, both when the trespasses involved in the case of *Tompkins v. Vintroux, supra,* were committed, and also when the alleged trespasses in the case at bar were committed. In other words, this statutory provision was exactly the same when the alleged cause of action in the case at bar arose as when that in *Tompkins v. Vintroux* occurred.

In *Pegram v. Stortz,* 31 W. Va., 236, GREEN, J., says :—

"By the common law, all actions of tort died with the person. After the death of the wrong doer or the party injured, his representatives were not liable to be sued, and could not sue for such a tort, such as battery, slander, etc. See *Hole v. Bradford,* Raym. T., 58 ; *Little v. Conant,* 2 Pick., 527 ; *Franklin v. Low,* 1 Johns., 402 ; *U. S. v. Daniel,* 6 How., 13. This has been, to some extent, almost universally modified by statute, both in England and in the various states of this country. The extent of this statutory modification varies in different states. See Code W. Va., Sec. 20, p. 544."

The only other statutory provisions in the law of West Virginia bearing upon the survivability of causes of action in that State are the following :

Sections 1 and 2 of chapter 173 of the Code of Virginia of 1860, which, also, by virtue of the constitutional provision above referred to, became a part of the law of West Virginia at its organization, and remained such until altered or repealed by the legislature thereof, are as follows :

"Sec. 1. Where a party dies, or becomes convict of felony or insane, or a female party marries, or the powers of a party, who is a personal representative or committee, cease, *if such facts occur after verdict*, judgment may be entered as if it had not occurred.

"Sec. 2. Where such fact occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occurs as to *any* of several plaintiffs or defendants, the suit may proceed for or against the *others, if the cause of suit survive to or against them.*"

Said section 1 has remained in force and unchanged in the law of West Virginia from that time to this, except only that, in the Codes of 1868 and 1891, the words "or a female party marries," were omitted.

Said section 2 has also remained in force and unchanged in the law of that State, except only that in the Codes of 1868 and of 1891, this further provision was added to that section, namely :

"If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.

The foregoing statutory provisions, with the exception of the additional provision to section 2, just mentioned, were all in force as a part of the law of West Virginia when the cause of action stated in the case of *Tompkins v. Vintroux* accrued ; and the decision in that case was made in full view of those statutory provisions. In that case it was *held* :

"The action of trespass *quare clausum fregit* cannot be revived in the name of the personal representative of a deceased plaintiff."

The facts in that case were briefly these: Two joint owners of 1000 acres of land, John Lewis and Samuel Lewis, made partition of it by, amongst other things, a described division line. John sold and conveyed his part to William Tompkins, and Samuel sold and conveyed his part to two vendees, Lewis E. Vintroux and William T. Vintroux. The vendees of Samuel brought suit in April, 1861, against Beverly Tompkins, the heir of William Tompkins, for an alleged trespass. The controversy arose about the location of the division line according to the description of it used in the partition. On the trial, which was had in June, 1866, it was proven that the trespass charged was *in cutting timber*, &c., on a portion of the land which, if the division line was a straight line, would be on land claimed by the defendant. While the suit was pending, L. E. Vintroux died, and the suit was revived in the name of *his executrix*, and at the same term of the court at which trial was had, his death was suggested, and by consent the suit was revived in the name of Olivia Vintroux, his sole devisee. In the opinion of the court in that case, BROWN, President, the other judges concurring, says:

"The objection that this case, which is trespass *quare clausum fregit*, could not be revived in the name of the personal representative of one of the joint plaintiffs, who died pending the action and before verdict, I think is well taken, because the action survived to the other joint plaintiff, and

whether it so survived or not, *in neither case could it have been revived in the name of the personal representative of the deceased plaintiff.*"

The case at bar is not aided by the additional provision to section 2 above mentioned of the Code of Virginia. The plain language of said section 1 limits the operation of that section and of section 2 to cases "where a *party* dies," &c., or, in other words, to cases where a decedent in whose favor a cause of action has accrued shall have himself brought in his lifetime a suit upon that cause of action, and shall have died pending such action, and to cases where an action shall have been brought against a person against whom a cause of action shall have accrued and such person shall have died pending such suit. The addition to section 2 is also so limited in its operation; for the language is—"If a *plaintiff* or *defendant* die pending any action," &c. The case at bar does not, therefore, come within the operation and effect of the only change in the law of West Virginia touching the survivability of causes of action and revivability of actions, since the decision of the court of last resort of that State in the case of *Tompkins v. Vintroux, supra*; and the effect of that decision upon the case at bar is that the alleged cause of action did not, at the death of Bailey, survive by law. The decision in *Tompkins v. Vintroux, supra*, is the construction by the highest court of West Virginia of the foregoing statutory provisions there in force, and such construction will be accepted as conclusive in this court.

L. N. O. & C. R. R. Co. v. Mississippi, 133 U. S., 1587.

The action in the court below was consequently improperly brought by Walton as the alleged administrator of

Bailey, and, this being so, it cannot be revived in the name or behalf of any personal representative of Bailey.

This case is the opposite of *Warren v. Furstenheim, supra.* The cause of action in that case survived under the operation of the law of Tennessee because the action was brought by the decedent, and *before* his death. In the case at bar, however, Bailey did not bring any suit upon the alleged cause of action in his lifetime, it having then fully accrued, and so the additional provision to Section 2 above mentioned does not apply to the case at bar.

At the death of Bailey, therefore, the alleged cause of action, under the operation and effect of the law of West Virginia, as settled by its statutory provisions and the adjudication of its court of last resort, in *Thompson v. Vintroux,* did *not* survive.

See *Cunningham v. Sayre,* 21 W. Va., 440.
Gerling v. B. & O. R. R. Co., 151 U. S., 673.

In the last named case (in the report of which in the margin is given the above mentioned statutory provisions), this court *held:*

"8. The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law.

"9 In West Virginia no action for personal injury can be maintained by the executor or administrator of the per-

son to whom tho wrong was done, except for a wrongful act, neglect or default causing death."

That was a case where the injured person, Martin, brought the action in his lifetime to recover for his alleged injuries, and died pending the suit. Thereafter his death was suggested, and his administrator came in to prosecute the action in his stead. And this court held that the cause of action therein alleged, although it had become "imbedded in a suit commenced," (to use the language of Judge HAMMOND, *Warren v. Furstenheim, supra*) did not survive by the law of West Virginia, because it was not saved from abatement by the statutory provisions of the law of that State.

5 The question of the non-survivability of the alleged cause of action is not waived, because it has not been raised by plea in abatement or by demurrer. The question necessarily arises from the facts appearing on the face of the amended petition. The alleged trespasses, that they accrued in the lifetime of Bailey, and that he died without having brought a suit upon the alleged cause of action, all affirmatively appear by that pleading. When the local law, of which this court will take judicial notice, is applied to the facts alleged, including those just mentioned, the question is presented, whether the amended petition states facts sufficient to constitue a cause of action. By the Ohio Code of Civil Procedure (Sec. 5064, Rev. Stats. of Ohio), a failure to object, by demurer or answer, to a petition, on the ground that it does not state facts sufficient to constitute a cause of action, does not waive that ground of objection, or the right

to make such objection, at any time before final judgment *in error.*

Youngstown v. Moor, 30 O. St., 133.

If there was no *subsisting* cause of action *at the time the action was commenced*, nothing is waived by a failure of the defendant below to demur or answer.

P. C. & St. L. Ry. Co., v. Hine, Admrx., 20 O. St., 629, 635.

II

The only claim made by opposing counsel in support of the right of Ellenwood to prosecute this action in a Federal Court is based upon the alleged right which Walton had to commence it, if the alleged cause of action survived the death of Bailey, and he was lawfully appointed administrator, and the claim of Ellenwood to be the successor of Walton. The allegation that Walton was a citizen of New Jersey has always been controverted, and the record shows that no evidence was offered either by Walton, or by Ellenwood, to sustain the allegation.

It is conceded on all hands that Ellenwood could not have brought this action in a Federal Court. And said claim assumes the truth of the allegation as to Walton's place of residence and citizenship, which was controverted. As the sole basis of the jurisdiction of the court below was his citizenship, it was necessary to prove it. The citizenship of Bailey at the time of his decease, and the citizenship of his

heirs at law or legatees, did not give jurisdiction of the action.

Chappedelaine v. Dechenaux, 4 Cranch, 306; *Browne v. Strode*, 5 Id. 303; *Childress's Executors v. Emory*, 8 Wheat. 669; *Osborn v. Bank of the United States*, 9 Id. 856; *McNutt v. Bland*, 2 How. 15; *Irvine v. Lowry*, 14 *Pet.* 298; *Huff v. Hutchinson*, 14 How. 586; *Coal Co. Blatchford*, 11 Wall. 172; *Rice v. Huston*, 13 Id. 66; *Hess v. Reynolds*, 113 U. S. 73.

III.

When a motion is made to revive an action in the name of a person claiming to have been appointed and qualified as administrator, and his right to revive is controverted, the controverted fact must be proved by profert of letters of administration, or by other satisfactory legal evidence of his appointment and qualification.

Wilson v. Godman's Executor, 3 Cranch, 193.

One of the "causes" shown by the defendant, The Marietta Chair Company, against the revivor applied for, was that "said L. W. Ellenwood is not the successor in office of said W. N. Walton, as Administrator of the estate of said Latimer Bailey, deceased." There was no profert of any letters of administration to L. W. Ellenwood, and no other proof that he was the Administrator of Latimer Bailey was offered.

IV.

Where the jurisdiction of a Federal Circuit Court is founded solely upon the personal citizenship of one who sues, not in his own right, but in the right of another, as where one sues in a representative capacity, and the right of that person to further prosecute the suit in the right of such other person has ceased, as where his representative capacity has ended, no new person can continue such suit in the right of that other in whose favor the cause of action arose, unless such new person would have the right to bring an original suit on that cause of action in the Federal Court.

Whilst this precise point may not have been ruled, we submit that the ground or principle upon which it is made has been established.

The jurisdiction of the circuit court is determined by the citizenship at the commencement of the suit.

Connolly v. Taylor, 2 Peters, 556.

And subsequent change of *domicile* does not affect it.

Morgan v. Morgan, 2 Wheat, 297.

These rules are subject to the limitation that there shall be no change of *party*.

Connolly v. Taylor, 2 Peters, 556.

The action in the court below must be considered, so far as the question of jurisdiction is concerned, as a controversy

between *Walton*, as administrator of Bailey, and the defendant.

Clark v. Mathewson, 12 Peters, 171; *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Childress' Executors v. Emory*, 8 Wheat, 669.

This is not an action which was brought by Bailey in his lifetime, and upon his decease, revived in the name of his administrator. It is not, therefore, within the provisions of section 955, Rev. Stats., as to the abatement and revivor of actions.

But if an order of revivor had been made in the court below, there would have been a change of party plaintiff, and the controversy would not have been between the administrator of the original plaintiff, but it would have been between Ellenwood, as administrator of Bailey, and the defendant. So that the effect of the revivor would have been to make the controversy one between *different parties* than the original parties.

Ellenwood, if the action could have been revived by him, would have been able to *maintain* an action which he could not have originally *brought*. This would violate the limitation of the rule that there shall be no change of *party*. The case at bar is to be distinguished from *Clark v Mathewson*, in that the latter was a case brought by *the decedent* in his lifetime and continued after his death by *his* administrator. The revivor in that case was held to be but the continuation of the original suit, under the practice in equity cases, and also under the provisions of section 955, R. S.; that was a suit and controversy between a plaintiff who died during the

pendency of his suit and the defendant, and it was *his* citizenship that gave the court jurisdiction, and the revivor of the suit was but the continuation of the original suit based on the jurisdiction so acquired. But, in the case at bar, it is the alleged citizenship of *Walton* and *not* that of the intestate, Bailey, which is claimed to have conferred federal jurisdiction. The controversy here as to jurisdiction, was between *Walton* and the defendant. Walton has not died, and it is not *his* representative who seeks this revivor; but it is one who claims to be the representative of the deceased, Bailey.

Section 955, of the Revised Statutes does not apply to the case at bar because that section is limited by its terms to cases where "either of the parties * * * *dies*;" and Equity Rule 56 is only declarative of that section of the statutes so far as it applies to equity causes.

Fitzpatrick v. Domingo, 14 Fed. Rep. 216.

Kroff v. Poth, 19 Fed. Rep. 200.

In the case last cited it was held: "Under the provision of Section 955, of the Revised Statutes of the United States, when an alien sues in the Circuit Court and dies, the suit cannot be continued to final judgment by his executor or administrator, unless such executor or administrator has taken out letters testamentary or of administration on the estate in the state where the suit is brought."

NIXON, J., in this case, says: "It would be anomalous to allow *a person* to *continue* a suit which he is not authorized to *begin*. It is a more reasonable construction of the section"

(referring to Section 955) "to hold that when Congress authorized the *continuance* of a pending suit in the name of the executor or administrator, it meant to refer to *an executor or administrator who was comptent to begin the action.*"

Steward v. Dunnan, 115 U. S., p. 61, simply holds that, in a *case in equity*, where an action is brought by certain persons, who have the requisite citizenship to entitle them to bring it in the Federal Court, as creditors, on behalf of themselves and all other creditors choosing to come in, to set aside a conveyance of merchandise made by the common debtors and alleged to be in fraud of their creditors, the jurisdiction of the court would not be ousted by the admission, as co-complainants, of other creditors of the common debtors who are residents of the same state as the defendants. This decision is based upon the fact that the parties who brought the action, and whose citizenship gave the jurisdiction, were still parties to the suit and prosecuting it; that the conveyance, if set aside as fraudulent upon creditors, would necessarily have to be set aside in favor of *all* creditors, and this would have to be done whether any other creditor was admitted as co-complainant or not; that it was a mere question of practice whether new creditors should come in as co-complainants, or before a master under an order of reference, and if the latter course should be adopted no question of jurisdiction could arise, and that the adoption of the alternative was in substance the same thing; and further, the gist of the decision was that letting in the new creditors and passing upon their rights was merely *ancillary* to the main suit and to the jurisdiction acquired in the main suit between the original parties.

Phelps and others v. Oaks and others, 117 U. S., p. 236, and

Hardenburgh v. *Ray, et al.*, 151 U. S., p. 112, which are at this point identical, simply hold that where the Federal Court voluntarily follows a State Statute, this action being discretionary with the Federal Court, letting in a landlord to defend an ejectment suit brought against his tenant, the court in voluntarily following the State Statute does not thereby defeat its jurisdiction, and the plaintiff in ejectment still has a substantial and real controversy with the tenant, the court basing its decision, as in *Stewart v. Dunnan*, upon the fact that letting in the new party "should be treated as incidental to the jurisdiction thus required—the jurisdiction in the case as originally brought against the tenant—and auxiliary to it."

Morgan's Heirs v. Morgan, 2 Wheat, p. 290, *Mollan v. Torrance*, 9 Wheat, p. 537, and *Dunn q. Clarke*, 8 Pet. p. 1, all simply hold that where an action is brought in a Federal Court by a person in his own right, his citizenship at the commencement of the action gives that court jurisdiction, and if he thereafter becomes a citizen of the same State as the defendant, the jurisdiction of the Federal Court is not divested, and the case proceeds in the Federal Court. All that these cases decide is that the citizenship which gives a court jurisdiction is citizenship at the commencement of the suit, subsequent citizenship being immaterial; that the court having once lawfully acquired jurisdiction in the case, can proceed to try that case, the *parties remaining the same*. These decisions are obviously inapplicable to the case at bar. In *Dunn v. Clarke* the jurisdiction was sustained because the action was purely *ancillary* to and in aid of a previous judgment rendered in an action where the citizenship was diverse.

Inasmuch as in the court below opposing counsel relied mainly upon *Clarke v. Matthewson, supra*, we call special attention to it. It was a bill in equity brought in the Circuit Court of Rhode Island by a citizen of Connecticut against citizens of Rhode Island; the plaintiff died, and administration of his estate was taken out in Rhode Island by a citizen of Rhode Island, the laws of Rhode Island then requiring that no one but a resident of Rhode Island could take out letters of administration in that State, and such laws also making administration in Rhode Island indispensable to the prosecution or defense of any suit in the State in right of the estate of the intestate. The Supreme Court reversed the Circuit Court for refusing to revive the action in the name of the Rhode Island Administrator. The judgment of reversal was placed upon the ground that the suit being one in equity, upon the death of the plaintiff it could be revived in the name of his administrator, according to the practice in chancery; and that if upon general principles of equity, any doubt could be entertained upon the subject, the court thought it entirely removed by the 31st Section of the Judiciary Act of 1789, c. 20 (the provisions of which are now contained in Sec. 955, R. S.). Judge Story, in the opinion, said that the death of either party might at common law, upon the mere principles of that law, have produced an abatement of the suit, which would have destroyed it. But in Courts of Equity, an abatement of the suit, by the death of a party, has always been held to have a very different effect; for, he said, such an abatement amounts to a mere suspension, and not to a determination of the suit.

This decision does not apply to the case in hand, because

it is not within the provisions of said section 955, which does not provide for the revivor by an administrator *de bonis non* of an action brought by an administrator whose powers cease during the pendency of the action. We also call attention to the fact that in *Clarke v Mathewson* the laws of Rhode Island required that no one but an Administrator appointed in Rhode Island could prosecute a case in that state, and that no one but a resident of Rhode Island could be appointed an Administrator by the courts of that State, so that unless a revivor could be had in favor of an Administrator who was a resident of Rhode Island the case could not proceed. No such difficulties existed in the case at bar. There was and is no limitation whatever in the Ohio statutes requiring citizenship or residency within the state as a qualification for administrators, and the Probate Courts of the State often appoint non-residents to be administrators. Furthermore, section 6133, of the Revised Statutes of Ohio, provides that "an executor or administrator, duly appointed in any other state or country, may commence and prosecute any action or proceeding, in any court in this state, in his capacity of Executor or Administrator, in like manner and under like restriction, as a non-resident may be permitted to sue." The restriction referred to simply requires the foreign administrator to secure the costs of the suit. There never has been in Ohio any other restriction on the right of a non-resident to bring a suit. We also call the attention of the court to section 4991 of the Revised Statutes of Ohio, by virtue ef which where, "in an action commenced, or attempted to be commenced, in due time, a plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such failure, expired, the

plaintiff, or if he die, and the cause of action survive, his representative, may commence a new action within one year after date." The abatement of an action by the removal of the personal representative who brought it would, of course, be a failure " otherwise than upon the merits.,' The parties interested in Bailey's estate could have had *a citizen of another state* appointed Administrator thereon by an Ohio Probate Court. If the right of action survived, and such an action can be revived by an administrator *de bonis non*, as is claimed by opposing counsel, the suit in the court below could have been revived by such new Administrator ; or the action could have been allowed to abate, and at any time within one year a new action could have been brought either in the state or the Federal Court, for the same cause of action, notwithstanding the time limited for the commencement of an original action might have elapsed at the date of the abatement, if no suit had been previously brought. The action of the court below was not, therefore, final, and did preclude the parties interested in Bailey's estate from such legal remedies as were necessary to prosecute the claim upon which the action below was founded. We have not found any cases, and none, we think, exist, except those where the revivor was *in the right* of a person who was entitled to, and who in fact did, originally commence the action in a federal court, on the ground that the plaintiff was not a citizen of the state in which the defendant resided and was sued, and upon his death his administrator or executor applied to have the same revived.

V

The Probate Court of Washington county, Ohio, had no jurisdiction to appoint Walton, or Ellenwood, Administrator of Latimer Bailey, deceased, said Latimer Bailey having died in the State of New York, and being at the time of his death and for many years theretofore a resident of the State of New York, and having left no estate to be administered within said Washington county, the appointment of each of them was, therefore, void for want of jurisdiction.

The Probate Courts of Ohio are courts of special and limited jurisdiction. Their jurisdiction in Probate and testamentary matters even is special and not general. And this is true of all the jurisdiction conferred upon them ; their jurisdiction is created by statute, the statutes grant specific and not general jurisdiction ; and the auxiliary and incidental powers of the court are expressly limited to such as are necessary and proper to carry into effect the powers thereby expressly granted. *Davis et al v. Davis*, 11 Ohio St. Rep. 386, 391. The doctrine laid down in that case is recognized by this court in *McArthur v. Scott*, 113 U. S., p. 341, although it was there held that where a court is vested by statute with the jurisdiction to grant letters of administration there is an ancillary right to grant a limited administration when necessary for the purposes of justice, although not specified in the statutes under which such court acts. Whilst an Ohio Probate Court is a court of record, and its records import absolute verity, and it is competent to decide on its own jurisdiction, and to exercise it to final judgment, with-

out setting forth the facts and evidence on which it is rendered, and an order of appointment made by a Probate Court of Ohio, in the *exercise of jurisdiction, and the record showing nothing to the contrary*, cannot be collaterally impeached; yet where the record does show that the court had no jurisdiction to make the order of appointment, such order is void and may be collaterally attacked. See *Shroyer v. Richmond*, 16 Ohio St. Rep. 455. The sole jurisdiction of an Ohio Probate Court to appoint an administrator is now conferred, and ever since prior to the death of said Latimer Bailey has been conferred, by Sections 5994 and 6013 of the Revised Statutes of Ohio. These sections have not been changed since many years prior to the death of Latimer Bailey. Section 6013 provides, that in all cases where a non-resident decedent *has been engaged in the prosecution of business in Ohio and has left in Ohio any property belonging in whole or in part to his estate*, the Probate Court of the county in which such business may have been prosecuted, or of any county in which such property may be situated, or where any debtor of such decedent may reside, shall, *upon the application of any creditor of such decedent, whose claim is founded on a contract made or a right of action which accrued within this State*, grant to such creditor or to some other person administration of all and singular the assets of such decedent situate within the State of Ohio. This is not the section under which opposing counsel claim the jurisdiction of the Probate Court of Washington County to appoint Walton and Ellenwood. The record shows affirmatively *that Walton was not a creditor of Bailey*; that Bailey did not leave in Ohio, or at least did not leave in Washington County, Ohio, any property belong-

ing to his estate. This latter matter of fact will be discussed when we come to consider section 5994, under which opposing counsel do claim the Prabate Court of Washington County, Ohio, had jurisdiction to make the appointment. We only refer to the terms of section 6013 to show that if the Legislature of Ohio ever had intended to vest the Probate Courts of Ohio with jurisdiction to appoint an Administrator of a non-resident decedent under circumstances which opposing counsel *claim* the record in the case at bar presents—a claim which we controvert, and which will be presently considered—the Legislature would certainly have given this jurisdiction in section 6013, where as in section 6013 they have very carefully granted the jurisdiction in terms which exclude the jurisdiction in such cases as opposing counsel claim the case at bar presents. The express exclusion of any right to appoint an administrator of a non-resident decedent in a county where any debtor of the decedent may reside, except where the decedent had been engaged in the prosecution of business in Ohio, and where the application for the appointment was made by a creditor whose claim was founded on a contract made, or a right of action which accrued, within Ohio, shows, we submit, that the Legislature could not have intended by section 5994 to have vested in the Ohio Probate Court that jurisdiction claimed by opposing counsel to be thereby vested, which jurisdiction the Legislature so carefully and explicitly excludes in section 6013. The jurisdiction which is claimed by opposing counsel to be vested in Ohio Probate Courts by section 5994, and which as stated is carefully excluded in Sec. 6013, is the jurisdiction to appoint an administrator of a non-resident decedent by the Probate Court of a county where a debtor of such decedent may reside, upon the application of a person who is not

a creditor of the decedent. The court upon reading Sec. 6013 will see that although any person may be appointed administrator, the application must be made upon the application of a *creditor*, and he a creditor whose claim is founded on a contract made or a right of action which accrued within the State of Ohio. Secs. 6013 and 5994 are in the strictest and most limited sense *in pari materia*. Can it be supposed that the Legislature of Ohio intended by one of these sections to vest a jurisdiction which it has so carefully excluded and guarded against in the other? This point is made upon the provisions of said two sections of the Ohio Revised Statutes, and with knowledge that this court held in *Wyman, Treasurer, v. United States*, 109 U. S., 666, that, independently of statutory provisions to the contrary, "For the purpose of founding administration, a simple contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found or payable."

Section 5994 provides that when any person shall die intestate in any other State or country, leaving any estate to be administered *within the State of Ohio*, administration thereof shall be granted by the Probate Court *of any county in which there is any estate to be administered*. This is the section under which opposing counsel claim the Probate Court of Washington County, Ohio, had jurisdiction to appoint Walton and Ellenwood, respectively, administrator of Bailey, a non-resident intestate decedent. We controvert the jurisdiction, upon the ground that Bailey, as shown by the record, did not leave any estate to be administered in

said Washington County. That the existence of this fact—the leaving by Latimer Bailey of an estate to be administered in Washington County—was an essential pre-requisite to the jurisdiction of the Probate Court to appoint Walton, or to appoint Ellenwood, opposing counsel concede. The only difference between us is that opposing counsel contend that the record shows this fact, either expressly or by presumption of law, whilst we maintain that the record expressly negatives the existence of such fact.

The Probate Court appointed Walton Administrator of the estate of Bailey. We, of course, admit that in the court below we were making a collateral attack upon an order of a court, and that we can collaterally attack an order of the Probate Court appointing an administrator only on grounds upon which a judgment of a court of record can be collaterally attacked. But our attack is based upon a want of jurisdiction on the part of the court over the subject matter of its action, and the right to attack any judgment or order of any court on this ground is too well settled to require argument or citation. See Van Fleet's Collateral Attack, Sec. 16. It was claimed by opposing counsel in the court below that the existence, in point of fact, of the jurisdictional fact—namely, leaving by the non-resident intestate decedent of an estate to be administered in Washington county, Ohio — and not the statement or finding as to this fact in the record of the Probate Court that made the appointment, gave that court jurisdiction. If this contention be sound, then it would necessarily follow, that the non-existence of this fact would defeat the jurisdiction; and this without reference to what may appear as a finding as to the jurisdictional fact in the record of the court making the appointment. In accordance with this doctrine it seems to be

settled by the overwhelming weight of authority that the appointment of an administrator for a *living* person is absolutely void for want of jurisdiction, even when collaterally attached, although the court making the appointment found the jurisdictional fact of death of the alleged decedent and acted entirely regularly in the exercise of a jurisdiction which the court undoubtedly had if the jurisdictional fact existed. This doctrine, originally laid down by Mr. Justice Buller, *Alvin v. Dunvas*, 3 T. R. 125) Judge Duncan *McPherson v. Cunliff*, 11 Serg. & Rawle, 422), and Chief Justice Marshall, *Griffith v. Frazier*, 8 Cranch, 9), has been held by the Supreme Courts of Alabama, California, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas and Wisconsin, and by two United States Circuit Courts, (*Lavin v. Savings Bank* 1 Fed. Rep. 641, and *United States v. Payne*, 4 Dillon, 387). The record in this case affirmatively shows the non-existence of the fact which is conceded on all hands to have been an essential pre-requisite to jurisdiction in the Probate Court to make the appointment of Walton as administrator of Bailey. The answer of the defendant to the rule to show cause against revivor, which the court below decided to be a good and sufficient showing of cause against revivor, which decision is the error alleged in this court, averred that Latimer Bailey "did not leave any estate to be administered within the State of Ohio, or in said (Washington) county." This allegation was not controverted by any pleading, and no evidence was offered to show it is not true.

Again, the non-existence of this jurisdictional fact affirmatively appears upon the very record of Walton's appointment.

This is a conclusive answer to the contention of the other side. It may be conceded that a Probate Court in Ohio is not a court of inferior jurisdiction in the technical sense, and that its records do not have to show affirmatively the jurisdictional facts authorizing it to act. It may be also conceded that, from the mere fact of an appointment by the Probate Court of an Administrator, it will be presumed, *nothing appearing to the contrary*, that the court found the jurisdictional facts to exist, and that such court is competent to pass upon its own jurisdiction. It may be even conceded that where the record of the Probate Court making the appointment shows jurisdiction, either expressly, or by implication from the fact of the exercise of jurisdiction in making the appointment, its jurisdiction cannot be collaterally attacked by proof or evidence of facts *dehors the record*. We, of course, concede that mere irregularities or errors not going to the jurisdiction, would not render an appointment subject to a collateral attack. Our position is, that the record of the Probate Court in the matter of the appointment of Walton *affirmatively shows* the courts want of jurisdiction to make the appointment. So far from endeavoring to impeach the record we are standing and relying upon it. Section 6005, Revised Statutes of Ohio, in force ever since prior to the death of Bailey, enacts, "provided, however, that *letters of administration shall not be issued* upon the estate of an intestate until the person to be appointed has made and filed an affidavit that there is not, to his knowledge, any last will and testament of the alleged intestate; provided, further, that every person, *before being appointed executor or administrator*, shall make and file an application under oath, which shall contain the names of the husband or widow, and all the next of kin of the deceased to such person known, their post-office address, if known, and also a statement in general

terms as to what the estate consists of and the probable value thereof." It was contended by opposing counsel, in the court below, that this statute is discretionary and not mandatory; that the making and filing of the affidavit and application is not a pre-requisite to the vesting of jurisdiction in the Probate Court to make the appointment. Now, the language of the statute is mandatory. The facts which the affidavit and application must show are absolutely essential to enable the court to exercise its jurisdiction at all. The court must find that a person has died, and died *intestate*, before it can appoint an *Administrator* of his estate; the court must know the husband or widow or next of kin of the deceased, that it may know who are entitled to preference, under the statute, in appointment, and who are interested in the estate; the court must know the value of the estate in order to enable it to fix the amount of the administration bond, according to the requirement of the statute; and under a provision of section 6005, no administrator can be appointed of an estate worth one hundred dollars, or less, unless a relative or creditor will accept the appointment. It is essential to the jurisdiction of any court that its jurisdiction be invoked in such a manner as to enable it to exercise its jurisdiction. No presumption can be indulged in concerning any outside statements which counsel may imagine were made to the Probate Court in relation to the matters which the statute imperatively required to be contained in the application and accompanying affidavit, and which constitute the foundation of the action of the court invoked by them. Moreover, inasmuch as the law prescribes that the Probate Court shall act upon the application and affidavit, it must be presumed that the order was founded upon them and nothing else. In

Monell v. Dennison, 17 How. Pr. (N. Y.) 426, it was held, that a *prima facie* case for appointment must be presented to a Probate Court in order to cause jurisdiction of that court to make the appointment to attach.

But the question whether the filing of a proper affidavit and application for appointment is a pre-requisite to the attaching of jurisdiction to appoint, is immaterial in the case in hand. The application was filed, and is part of the record of Walton's appointment. It was signed and verified by Walton himself. It is part of the Probate record in the matter of the appointment, and is therefore conclusively binding upon all concerned. It was by means of and upon this application that the jurisdiction of the Probate Court to make the appointment was invoked; it was upon it, and upon it only, that the Probate Court is conclusively presumed to have acted in making the appointment; it is not only an integral part of the record of appointment, but the foundation of the order of appointment. It sets forth that "Latimer Bailey, a resident of the City of New York, died on or about the 4th day of May, A. D., 1885, and that there is not, to the knowledge of this affiant, any last will and testament of said decedent. Bailey was a non-resident of the State of Ohio, and this appointment was made to prosecute a suit or suits in this county. * * * There is no personal property in this (Washington) county of said decedent and no real estate." This application was verified positively by Walton. See p. 19 of record. Upon this application the Probate Court, so far from *finding any of the facts* necessary to give jurisdiction to make the appointment, found "that it is *expedient* that an administrator should be appointed upon said estate." Opposing counsel claim that the Probate Court had jurisdiction to

make the appointment because, they say, the estate of Bailey had a cause of action against a resident of Washington County, which cause of action, they further say, is the cause of action on which suit was brought in the court below. This claim is made for the reason that unless the jurisdiction of the Probate Court can be shown by matters *dehors* the record, and contradicting it, it is evident the order appointing Walton is void for want of jurisdiction. A chose in action is personal property, and the record in the matter of appointment shows that there was no personal property in Washington County belonging to Bailey's estate; and that it was deemed expedient to appoint an administrator to prosecute a suit or suits in Washington County.

Furthermore, the claim made by opposing counsel to sustain the jurisdiction to appoint, namely, that a cause of action then existed in favor of the estate of Bailey against a resident of Washington County, is not supported by the record in the case at bar. The supposed cause of action is the cause of action upon which suit was brought in the court below. By this we do not mean that the cause of action did not exist because its existence is controverted in this suit; but what we maintain is that the record does not show that at the time of Walton's appointment the estate of Bailey was asserting any claim against The Marietta Chair Company; nor does it show that the company was at that time, or any other, a resident of Washington County. No suit was brought against it in that county. The only fact appearing in the record as to its residence is that it is a citizen of the State of Ohio. In the caption of the *original* petition, for which the *amended* petition was substituted, it

is recited that The Marietta Chair Company has its principal office and place of business in the county of "Worthington." Should "Worthington" be changed to Washington, it would be of no avail. For, the recital of citizenship in *the caption* of the original petition amounts to nothing. *Mexico Sonthern Bank v. Reed* (U. S. Ct. Ct. S. D. O.), 4 Weekly (Ohio) Law Bulletin, 391. Recitals in the caption of a petition do not constitute allegations of fact, and therefore are not admitted by demurrer or failure to deny them. Even recitals in the body of a pleading merely *descriptio personæ* are not issuable averments. 28 How. Pr. 326, 23 Barb. 592, 10th Kan. 206, 68 M. O. 581, 1 Western Law Monthly, 155.

The other side may say that the statement in the application that the appointment was made to prosecute a suit or suits in Washington County should, by liberal construction, be held to be equivalent to a statement that the estate held a claim against a resident of Washington County. If this were so, it could not be held that it was intended to refer to the claim made in the case at bar, as claimed below by opposing counsel, since this claim is for ten thousand dollars, and the bond offered by Walton and accepted by the court was for only one hundred dollars, and this suit was not brought in Washington County.

But the construction claimed for the statement in the application is, we submit, untenable. It is inconsistent with the plain and positive sworn statement of the application that "there is no personal property in this county." Suits may be prosecuted which are not founded upon a pecuniary claim; and suits might be prosecuted by suing out attachments, in Washington County founded upon claims against

non-residents of the county or of the State. Evidently, therefore, the application of Walton to be appointed Administrator to prosecute a suit or suits in Washington County would not have necessarily shown that there was any estate of Bailey in that county, even if the application had not stated that ""there is no personal property *in this county.*"

In *Railroad v. Swayne's Admr.*, 26 Ind. 148, it was held that letters issued where the intestate was not a resident of the State and left no property in the State were absolutely void, as *coram non judice*, there being no basis of jurisdiction. In *Epping v. Robinson*, 21 Florida, 36, it was held that where the records of a Probate Court affirmatively showed a want of jurisdiction to appoint an administrator, the appointment was absolutely void. In *Perry v. St. Joseph, etc., R. R. Co.*, 29 Kan., 420, and in *Crosby v. Levvitt*, 4 Allen (Mass.), 410, it was decided that in a suit by an administrator an answer that the decedent was a non-resident and left no assets in the state, was a defense to the action. Mr. Vanfleet, in his work on Collateral Attack, says: "The majority in number of the cases hold, either expressly or impliedly, that the *de facto* doctrine does not apply to private officers like administrators and guardians."

VI.

The suit commenced by Walton was not saved from abatement by, and could not be revived under, the provisions of section 955 of the Revised Statutes of the United States; and as said section governs the federal courts in matter of revival of actions to the exclusion of any state

law on the subject, the said suit could not be revived under the provision of the Revised Statute of Ohio concerning the revival of actions. The Congress having legislated upon the subject, its legislation is exclusive.

Whilst the state laws must be resorted to to determine what causes of action survive (*Schreiher v. Sharpless*, 110 U. S. 76), the Federal Statute must be resorted to to ascertain and determine whether a suit commenced upon a cause of action which, under the State laws, survives, can be revived after it has abated.

Richards v. Maryland Ins. Co. 8 Cranch, 64.

Fitzpatrick v. Domingo, 14 Fed. Rep., 216.

Kropff v. Poth, 19 Fed. Rep., 200.

See *The Indianapolis and St. Louis Railroad Company v. Horst*, 93 U. S., 291.

2 Foster's Federal Practice (2d ed.), 684.

Respectfully submitted,

R. A. HARRISON.
JOSEPH OLDS.
A. D. FOLLETT.

13-8-103

APR 13 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 234.

LOWELL W. ELLENWOOD, ADMINISTRATOR, ETC., PLAINTIFF IN ERROR,

vs.

THE MARIETTA CHAIR COMPANY.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EDWARD B. WHITNEY,
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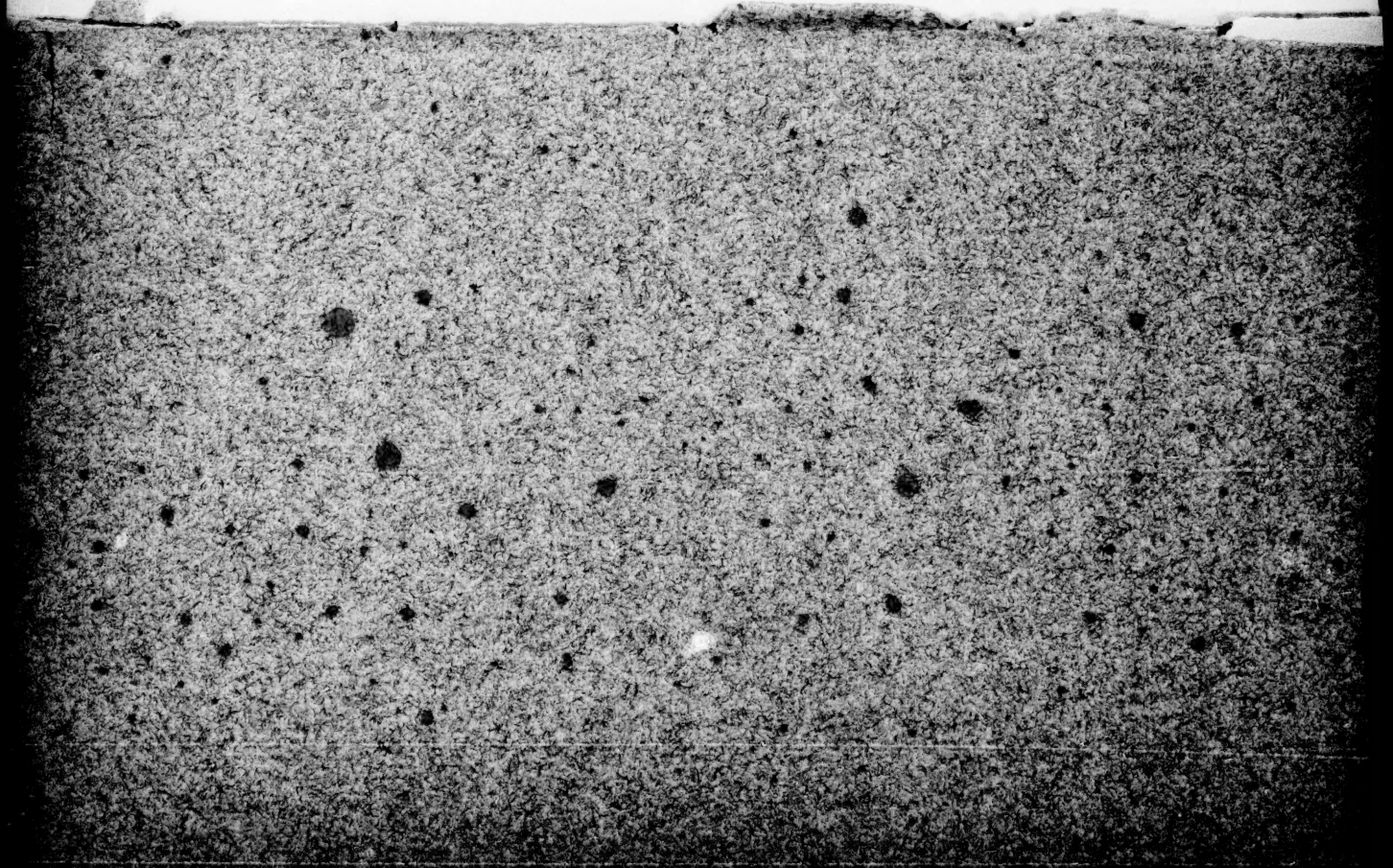
Of Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.



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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Defendant files a brief in which it endeavors to sustain the decision of the court below by the claim that this action is one of trespass *quare clausum fregit;* that the cause of action arose in West Virginia; that the West Virginia law governs the case; and that by the law of that State the cause of action did not survive. Its counsel also suggest that an action commenced by an administrator abates upon his removal from office and cannot be revived by his successor, and this for the reason that Congress has failed to legislate on the subject. They further now raise the claim that there should have been *profert* of the letters of administration.

Whether or not the action is one of trespass *quare clausum fregit* depends upon the language of the amended petition (Rec., p. 8). The material portion of the amended petition is as follows:

And the plaintiff says that said tract of land so owned and possessed by the said Latimer Bailey in his lifetime at the time aforesaid was thickly wooded with divers and sundry kinds of excellent timber standing and growing thereon, and that while said land and timber was so owned and possessed by said Latimer Bailey at the time aforesaid divers and sundry persons, knowing the land and timber to be the rightful property of the said Latimer Bailey and without any right or authority from the said Bailey whatsoever, *at the instance of and for the use and benefit of the said defendant*, on the said first day of January, 1875, and on divers other days from time to time continuously between that date and the said 4th day of May, 1885, *did cut down and remove and cut into saw-logs divers and sundry of said timber trees;* and the said defendant, well knowing the said saw-logs * * * to be the property of the said Latimer Bailey and well knowing the same to be cut from the said land, knowing the said land to be the property of the said Latimer Bailey, did, without any right or authority whatsoever from the said Bailey, *take into its possession the aforesaid saw-logs, timber, and logs* so cut and removed from said land, being the property of the said Latimer Bailey *and being of the value of $10,000, and did convert the same to its own use*, and by reason of the *taking, using, and conversion* of the said saw-logs, timber, and logs by the said defendant the said Latimer Bailey suffered damage to the full value of the same, to wit, the sum of $10,000 (p. 8).

I.

It is not necessary for the record to show profert.

Defendant was entitled to profert if he demanded oyer, otherwise not (*Wilson vs. Codman's Executor*, 3 Cranch, 193). It does not appear here that he demanded oyer. It does not appear that the letters of administration were not in court. It does not appear that he did not see them. This is evidently one of the afterthoughts.

II.

Assuming that the cause of action arose in West Virginia, nevertheless the question of survivorship is to be determined by the law of Ohio.

This case is governed by that of *Martin vs. Baltimore & Ohio R. R. Co.*, 151 U. S., 673, 692, 693. In that case the cause of action, namely, trespass on the case for personal injuries, arose in the State of Maryland. The action was brought in the State of West Virginia by a West Virginia administrator. Mr. Justice Gray, in delivering the opinion of the Court, says:

> The question whether the administrator has a right of action depends upon the law of West Virginia, where the action was brought and the administrator appointed.

The question of survivorship of a cause of action in tort cannot depend upon the law of the locality where the offense chances to be committed.

If it did not depend on the *lex fori* or on the law of the offender's domicil, it would depend on the law of the domicil of the owner of the cause of action, where the claim has its *situs;* in the case at bar upon the law of New York, which gives the right of survivorship. (2 N. Y. Rev. St., pp. 447, 448, §§ 1, 2; 1 *id.*, Birdseye's ed., p. 1130; N. Y. Code of Civil Procedure, § 1910.)

The moment that his trees were taken from his land Mr. Bailey lost certain real property and received instead certain personal property. The personal property was, at his option, either certain merchandise (timber) or a cause of action in trespass, or a cause of action in trover. The *situs* of the merchandise was in Ohio; that of the trespass was perhaps fixed in West Virginia (cases discussed in 29 Albany Law Journal, 308, 309); *Rundle vs. Delaware and Raritan Canal,*

1 Wall., Jr., 275, 288); while that of the trover was in New York, where the owner of the chose in action resided. If the tangible property were in West Virginia the law of that State might govern the assignability of the right to it; but we believe it has never been held that a transitory *chose* in action was governed by any law other than that of the *situs* or that of the *forum*, or at furthest by that of the place of assignment or indorsement.

III.

Assuming the law of West Virginia to govern and the action to be one of trespass, nevertheless the cause of action survives.

In *Martin vs. Baltimore & Ohio R. R. Co.*, 151 U. S., at page 695, Mr. Justice Gray says:

> In Virginia and West Virginia, except as specified in their own statutes, no action of tort can be maintained by or against the executor or administrator of the person to or by whom the wrong was done. (*Henshaw vs. Miller*, 17 How., 212; *Harris vs. Crenshaw*, 3 Rand., 14; *Curry vs. Mannington*, 23 W Va., 14, 18.)

At common law no cause of action in tort survived (2 Williams on Executors, ed. 1895, p. 4). The statute of Edward III covered only injuries to personal property, and did not extend to injuries to the freehold (*id.*, p. 6). The old Virginia law was much the same. It allowed actions of trespass "for any goods taken or carried away in the lifetime of the testator or intestate" (1 Rev. Code of 1819, p. 390, § 64; see also act of March 9, 1827, ch. 29). Under this act of 1819 the case of *Harris vs. Crenshaw, supra*, was decided, in which the court said (*obiter* indeed, but doubtless correctly) that an action of trespass *quare clausum fregit* dies with the person in case of death before verdict, and that it is not converted into trespass *de bonis asportatis* merely by an

allegation that the trees cut down were afterwards carried away. (See also *Upper Appomattox Co. vs. Hardings*, 11 Gratt., 1, 3.)

The injustice of the rule against survivorship of causes of action for injuries to realty doubtless led to the change in the revision of 1849 (Code of Virginia, 1849, p. 544, § 20):

> An action of trespass or trespass on the case may be maintained by or against a personal representative for the taking or carrying away any goods *or for the waste or destruction of or damage to any estate of* or by his decedent.

This clause was inherited by and has ever since remained the law of the State of West Virginia. (Code of West Virginia, ch. 85, § 20, quoted at 151 U. S., 693.)

The word "waste" does not apply at all to personal property. It is difficult to perceive any ground for claiming that the new clause, above italicized, applies more clearly to anything than it does to real estate.

As defendant in error relies largely on *Henshaw vs. Miller*, 17 How., 212, a careful examination of that case is advisable. It arose in Virginia prior to the revision of 1849 (p. 215). The court reviewed the earlier Virginia statutes and codifications, but said nothing about that of 1849, assuming that it did not apply to the case, which was an action on the case for fraudulent misrepresentations by defendant's testator. (See quotation, at page 224, from *Read vs. Hatch*, 19 Pick., 47.) Mr. Justice Daniel says of the section of 1819, then under consideration (p. 221):

> It is a simple section of the statute concerning wills, intestacy, and distribution, and clearly defines the single instance in which trespass may be maintained by the personal representative, the instance of "goods taken or carried away in the lifetime of the testator or intestate." No other species of trespass or wrong is enumerated or alluded to.

Counsel for plaintiff, however, had endeavored to lug in the new code, and it was therefore discussed by the executor's counsel as follows (p. 216):

> It * * * was designed to extend the remedies given to and against executors to cases of injury or damage to real as well as to personal estate.

Counsel in this case can find nothing to the contrary but an *obiter dictum* in *Tompkins vs. Vintroux*, 3 W. Va., 148, 153, where the decision was based on a consent order reviving the action in favor of a devisee of the decedent. This case was decided in 1869. Perhaps it was in part the reporter's carelessness in putting this *dictum* into the *syllabus* which led the constitutional convention of 1872 to provide that thereafter the *syllabus* should be prepared by the court, and concurred in by three judges (art. VIII, § 5). *Curry vs. Mannington*, 23 W. Va., 14, 18, was an action for damages for injuries to the person.

The latest Virginia and West Virginia practice book considers the section as applicable to all injuries to property (1 Barton's Practice, 2d ed., p. 115). In *Lee's Adm'r vs. Hill*, 87 Va., 497, 503, it is said that the statute should receive a liberal construction, and that the word "estate" is "among the most comprehensive words in legal terminology," referring to the very broad definition given in *Comegys vs. Vasse*, 1 Pet., 193.

The whole question of the form of the action is immaterial. It is the nature of the cause of action and not the form in which it is brought to the attention of the Court which governs its assignability and survivability. "The true test is not so much the form of the action as the nature of the cause of action" (*Lee's Adm'r vs. Hill*, 87 Va., 497, 500, citing *Powell vs. Layton*, 5 Bos. & Pull., 365, and *Booth vs. Northrop*, 27 Conn., 325). Hence an analysis of the pleading is out of place. If the conversion of trees cut from real property gives a right of action in trover or

trespass *de bonis asportatis* in West Virginia, which right of action is assignable and survives the death of the plaintiff, then it is immaterial what the code pleading in Ohio, considered as a common-law declaration under the West Virginia practice, would be called.

IV.

The petition, however, has a double aspect and contains a cause of action in trover or trespass de bonis asportatis, which actions lie at common law for timber cut down and carried away.

This subject was argued in the English court of common pleas in 1798 in *Williams vs. Breedon*, 1 Bos. & Pull., 329. The declaration in that case contained a count in trespass for cutting down, etc., the trees of plaintiff's testatrix and carrying away and converting to the use of defendant. It also contained a count "for seizing, taking, and carrying away the goods and chattels, *viz.*, wood, timber," etc., of testatrix. It appeared to be the same timber. The jury found a general verdict for plaintiff. The proceedings were as follows, on motion in arrest of judgment:

> *Le Blanc* now showed cause against that rule. Admitting that an executor cannot maintain this action for trees cut down in the lifetime of his testator under the first count in the declaration, yet, as it appears by the report that the evidence on which the verdict of the jury was founded applies to the second count only, the court may rectify any mistake by entering judgment on that count.
>
> *Williams*, Serjeant, in support of the rule, contended that, as evidence was produced at the trial of the fact of *cutting down* the trees and the jury had given general damages, the court could not apply those damages to the second count only, and that if therefore the first count was bad the judgment must be arrested.
>
> BULLER, *J.*: As evidence was given at the trial of the

fact of cutting down, if there had been no other evidence to show on what ground the damages were given by the jury, it certainly would not be competent to the court to alter the verdict. But in this case there was evidence to show that the damages given by the jury were compounded of the different sums for which the parcels of wood cut down by the defendant were sold. This circumstance, therefore, does entitle the judge to alter the *postea*, and the court must consider the case in the same light as if a verdict had been found for the defendant on the first count and for the plaintiff on the second.

Mr. Williams, after citing this case, adds: "So where grass is mowed by a trespasser and carried away as hay, an action of trover and conversion for so many loads of hay is doubtless maintainable by the executor." (2 Williams on Executors, ed. 1895, p. 7.)

Even Meeson & Welsby's Reports contain a recognition of the principle that the property in things severed from the land vests at once in the land-owner, who can sue for their value in an action of trover (*Martin vs. Porter*, 5 M. & W., 351). A multitude of authorities to the same effect is to be found in 26 Am. and Engl. Cycl. of Law, at pp. 775–777.

Not only timber but even earth may be recovered as personalty in an action of trover (*Riley vs. Boston Water Power Co.*, 11 Cush., 11). So may manure (*Strong vs. Doyle*, 110 Mass., 92) or coal. (*Forsyth vs. Wells*, 41 Pa. St., 291; *Martin vs. Porter, supra.*)

All causes of action for trover were within the protection even of the act of Edward III and of the Virginia code of 1819.

It need hardly be added that trespass and trover may be united in pleading under the code practice (Ohio Rev. St., § 5019; Pomeroy's Code Remedies, § 438). Whether or not the counts should be separately stated and numbered is a question of irregularity waived by failure to move in the premises before issue joined (*McKinney vs. McKinney*, 8 Oh.

St., 423). If plaintiff proves either, it is sufficient to maintain his action. His pleading is to be liberally construed in furtherance of justice (Ohio Rev. St., § 5096). Objections on the ground of indefiniteness or uncertainty must be made by motion. (*Trustees vs. Odlin*, 8 Oh. St, 293, 296; Pomeroy's Code Remedies, § 559, and cases cited.)

V.

The cause of action arose in Ohio.

Plaintiff is entitled, as above stated, to a liberal construction of his pleading and to a verdict if he proves any part of his case substantially as stated. Proof of delivery of the stolen timber at the office of the defendant company, in Ohio, would be sufficient to charge the company in trover.

A verdict would not be directed for defendant at the trial if plaintiff should fail to sustain by proof the words "at the instance of and for the use and benefit of the said defendant" in the first portion of the paragraph above quoted from the amended petition; yet, if everything else but this were proved, there would be nothing to indicate that this cause of action arose in West Virginia.

It is not disputed that the cause of action survives in Ohio. (Ohio Rev. St., §§ 4195, 5144.)

VI.

No criticism of the form of the petition was proper on the motion to revive.

If, though defectively, it showed a cause of action, that is enough for the purposes of the motion, though, properly construed, it were a declaration in trespass *quare clausum fregit*, and on that ground demurrable. No such objection could be taken after issue joined, for it shows that by "the

right of the cause" a claim in trover exists, which claim the pleader was endeavoring to include.

Section 954 of the Revised Statutes of United States provides that in case of such defects—

> Such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form other than those which the party demurring so expresses.

Ohio is equally liberal. (Ohio Rev. St., §§ 5114, 5115.)

VII.

The cause of action surviving, the right to revive results.

If the Ohio practice is not applicable, then the common-law procedure governs the case. Either way, it was error to declare the action abated and strike it from the docket. Defendant's contention, that Congress took away the pre-existing right of revivor after a removal from office by providing such a right after a death, verges on the absurd.

If the Ohio law did not govern, the case would be somewhat similar to that of *M'Coul vs. Lekamp's Adm'x*, 2 Wheat., 111, where it was held that a suit revived by a *feme sole* administratrix did not abate by her subsequent marriage, Chief Justice Marshall saying:

> The act of Congress provides for the case of death, but not for the case of marriage. Consequently the suit of a *feme sole* who marries abates as at common law; * * * But this suit was not instituted by a *feme sole*. * * * When, therefore, Albert Lekamp died his administratrix, since the cause of action survived, had full power given her by the statute [now Rev. Stat., § 955] to prosecute this suit until final judgment. The suit did not abate, but continued on the

> docket as the suit of Albert Lekamp. It did not become the suit of the administratrix, but remained the suit of the intestate, to be prosecuted by his representative. The marriage of this representative would abate her own suit, but could not abate the suit of her intestate.

If marriage did not abate the suit, why should rascality do so, when carried to an extent resulting in removal from office?

Thus, also, a suit instituted by the Emperor Napoleon did not abate upon his deposition from office, although the empire came to an end and a republic succeeded it. The Emperor and the new government each for the time being represented "the national sovereignty, and that sovereignty is continuous and perpetual," and because of this representative capacity the action went on. (*The Sapphire*, 11 Wall., 164, 168.)

Wherein does the case of a removed administrator differ upon principle?

All this is useless speculation, however, as the Ohio statute set forth at page 12 of our main brief clearly governs the case.

Respectfully submitted.

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